FAX : 0532-2400149

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
38,MG Marg Civil Lines,Old Red Building,Allahabad-211001
Regional Branch, Allahabad

Dated: 23/09/2016

To

Appellant as per address in table below

Respondent as per address in table below

Final Order No. A/70872/2016-SM[BR] dated 08/03/2016

I am directed to transmit herewith a certified copy of order passed by the Tribunal under section 35-C(1) of the Central Excise and Salt Act, 1944.

Asstt. Registrar

Application	Appeal	Name and Address of Appellant
1 E/MISC/51919/2015	E/1839/2005	CCE MEERUT (Opposite Shaheed Smarak), Delhi Road, Meerut
		Name and Address of Respondent
2		L.H. SUGAR FACTORIES LTD CIVIL LINES, PILIBHIT (U.P.).

Copy To
3Advocate(s) / Consultant(s): SH KAPIL VAISH,CA
146, 4TH FLOOR, TOWER A
THE CORENTHUM, SECTOR-62
NOIDA-201301

4 Bar Association, CESTAT, Allahabad

5 Director Publications, Customs, Excise. I.P. Estate, Delhi

6 M/s Centax Publications Pvt. Ltd., 1512-B, Bhishm Pitamah Marg, 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, Satellite Road, Ahmedabad-15

10 LAWCRUX Advisors Pvt. Ltd., LAW House, 1-8, Sector-10, Faridabad 121003 (Haryana)

11 TaxindiaOnline.com Pvt. Ltd., 2nd Floor, Vasant Arcade, Vasant Kunj, New Delhi - 110070

12 Mark Professional Services Pvt. Ltd., 108, Everest Block, Aditya Enclave, Hyderabad – 38

13 The ICFAI society, 52, Nagarjuna Hill,Punjagutta Hyderabad.-500082
14 M/S Knowledge Processing Pvt. ltd.(taxmanagementindia.com),FF-19,1st Floor,Cross River Mall,CBD Ground,Near Karkardooma Court,Delhi-110032
15 C.D.R. 16 Office Copy 17 Guard File

Asstt. Registrar

27/10/16

ISSUED ON

SIGN. (DESPATCH SECTION)
CUSTOMS EXCISE & SERVICE TAX
APPELLATE TRIBUNAL
38, M. G. MARG, ALLAHABAD-211001.

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

REGIONAL BENCH : ALLAHABAD

Single Member Bench

Appeal No. E/1839/2005 (SM) with E/Misc. 51919/2015

[Arising out of Order-in-Appeal No. 22-CE/MRT-II/2005 dated 28.2.2005 passed by Commissioner (Appeals), Customs & Central Excise, Meerut-II]

1.	Whether Press Reporter 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?	

Commissioner of Central Excise, Meerut-II **Appellant**

Vs.

M/s L.H. Sugar Factories Ltd. **Respondent**

Appearance:

Present for the Appellant: Shri Pawan Kumar Singh (Superintendent) AR
Present for the Respondent: Shri Kapil Vaish (CA)

Coram: Hon'ble Shri Anil Choudhary, Judicial Member

Date of Hearing/Decision: 08/03/2016

Final order No. 70872/2016

Per: Anil Choudhary

Revenue is in appeal against Order of Commissioner (Appeals) dated 28/2/2005 passed by the Commissioner (Appeals), Customs & Central Excise, Meerut-II.

2. The brief facts are that M/s L.H. Sugar Factories Ltd. the respondent had filed rebate claim under Notification Number 132/82 dated 21.4.1982 as amended by Notification Number 193/82 dated 11.06.1982 for excess production of Sugar produced during the period 01.5.1982 to 30.9.1982. The Assistant Collector provisionally paid an amount of Rs.9,50,000/- vide order dated 30/1/19584 and sanctioned Rs. 6,38,254.30 covering the period from 11/6/1982 to 30/9/1982. The assessee contested the order before the Collector (Appeals) for rebate on its production of sugar production prior to the period 11/6/1982, that is from 01/5/1982 to 10/6/1982. The appeal was rejected by Collector appeals and on further appeal of the assessee before Tribunal the appeal is allowed vide the Final Order dated 20/7/1998 and held that the amending Notification Number 193/82 had retrospective effect and not the prospective effect. Consequent to the Order of the Tribunal, the assessee filed refund claim for Rs.6,23,567.00 and in response thereto the Assistant Commissioner vide order dated 22/12/1999 sanctioned the rebate of Rs.5,35,123/-.

3. Being aggrieved with the order of rebate/refund dated 22/12/1999 the revenue preferred appeal before Commissioner Appeals which was dismissed by the Commissioner appeals vide order dated 28/2/2005. It is relevant to notice that the appeal of revenue was only on the ground of unjust enrichment. Further appeal was preferred by Revenue before this Tribunal and vide Final Order dated 28/3/2007 the appeal was dismissed. Thereafter Revenue preferred for the appeal to the Honourable Allahabad High Court. The question for consideration before the Honourable High Court was "whether the bar of unjust enrichment is applicable in respect of rebate claims". Vide Ex-party Order dated 9/4/2015 after hearing the Counsel for

the Revenue the Honourable High Court noticed that the issue of unjust enrichment, in the matter of rebate/claim, came up for consideration before the Apex Court in the case of Commissioner, Central Excise, Lucknow Vs. Kesar Enterprises Ltd. itself reported in 2006 (197) E.L.T. 317(S.C.). By judgement dated 23/3/2006 the Apex Court was pleased to hold that the principle of undue enrichment would be applicable and the assessee would not be entitled to refund of the excess amount of duty paid by it. With this observation the Honourable High Court was pleased to set aside the order dated 28/3/2007 of this Tribunal and remanded the matter to the Tribunal for a fresh consideration on merits.

4. Pursuant to remand by the Honourable High Court, the respondent assessee have filed Miscellaneous Application Number 51919/2015 raising a question of law 'that refund once granted cannot be demanded saved except by issuing a show cause notice under section 11 A of the Act. The said issue being a question of law and going to the root of the matter is allowed to be raised.

5. The ld. Counsel for the Revenue states that under the facts and circumstances the revenue had no occasion to issue show cause notice and as such no adverse inference can be drawn for the same. The ld. AR further emphasised that in terms of the order of the Honourable High Court this Tribunal should consider the aspect of unjust enrichment. This Tribunal on earlier occassion had directed the learnedly A.R. to seek instructions on the Misc. application filed by the respondent assessee. In response thereto the ld. AR produced the Ld. A.R. has produced report of the Assistant Commissioner, Bareilly being C. No. V(A) (18) legal/119/07/574 dated

18/2/2016 wherein the admitted fact is that no show cause notice was issued.

6. The ld. AR for the Respondent assessee relied on the ruling of the Division Bench of this Tribunal in the case of Morarjee Goculdas Spg & Wvg Vs. Commissioner of Central Excise reported in 2008 (222) E.L.T. 114 (Tri.-Mumbai) under the fact that in an order sanctioning refund was set aside by Commissioner appeals and the assessee was in appeal before this Tribunal, the question before the Tribunal was for recovery of erroneous refund whether it is required to show cause notice under section 11A of the Central Excise Act, 1944 or review under Section 35E, ibid is sufficient. The Tribunal observed that the issue stands settled by case laws and C.B.E. & C. Circular. It was held that show cause notice under section 11A is required for recovery of erroneous refund within the time limit as prescribed. Accordingly the order of Commissioner (Appeals) setting aside the refund order was set aside and the appeal allowed. The Honourable Tribunal have observed as follows in para-8 and 9 of its order as follows:

> **Para -8.** Initially there were some doubts as to whether the amount of refund sanctioned by the Dy. Commissioner dated 19-12-2000 was actually paid which was subsequently confirmed as actually disbursed to the appellants. This was in or around December 2002. Therefore, the issue is whether for recovery of erroneous refund, show cause notice under Section 11A is required to be issued or whether challenge to the Order of sanction of the refund under Section 35E(2) is sufficient. We find that this issue stands settled by series of decisions starting with the decision of Apex Court in the case of *CCE, Bhubaneshwar* v. *Re-rolling Mills* - 1997 (94) E.L.T. 8 (S.C.) which has been followed in *Rosemount (India) Ltd.* v. *CCE, Ahmedabad* - 1998 (99) E.L.T. 502 (Tri.). The

Hon'ble Supreme Court had upheld the Tribunal's decision in the case of *Re-rolling Mills* v. *CCE* - 1989 (43) E.L.T. 115 (Tri.) holding that show cause notice under Section 11A was required for the purpose of recovery of erroneous refund within the time limit. The Apex Court decision in the case of *Re-Rolling Mills* (cited supra) was followed in the case of *Best & Crompton Engg. Ltd.* v. *CCE, Chennai* - 2000 (121) E.L.T. 272 (Tri.-LB). The Tribunal's decision in *Re-Rolling Mills* was followed in the case of *Richardson & Crudaas 1972* - 2000 (123) E.L.T. 918 (Tri.) and *Panyam Cements & Mineral Indus. Ltd* v. *CCE* - 2004 (178) E.L.T. 434 (T). We also note that the Hon'ble Mumbai High Court in the case of *Bajaj Auto Ltd.* v. *Union of India* - 2003 (151) E.L.T. 23 (Bom.). has followed *inter alia* the decision of the Apex Court in the case of *Re-Rolling Mills* (cited supra). The CBEC also issued, Circular No. 423/56/98-CX., dated 22-9-1998 clarifying that the Order passed under Section 35E(2) does not automatically result in the recovery of the refund and that this has to be followed by show cause notice under Section 11A which should he issued within 6 months from the date of actual refund. No decision taking contrary view on the issue in this case relating to recovery of erroneous refund has been brought to our notice. Shri K.M. Mondal, ld. Consultant on behalf of the Revenue relies upon the Apex Court decision in the case of *Asian Paints (India) Ltd.* v. *Collector of Central Excise, Bombay* - 2002 (142) E.L.T. 522 (S.C.) holding that recovery of excise duty can be made pursuant to an appeal filed after invoking the provisions of Section 35E of the Central Excise Act, 1944 if the time limit provided in Section 11A has expired and Sections 35E and 11A operate in different fields and for different purposes, to support the contention of the Revenue that show cause notice under Section 11A is not required for erroneous refund and, resort to provision of Section 35E (2) is sufficient in such situation. However, we note that the Apex Court has been noted and distinguished the Tribunal decision in the case of

M/s. Pricol Ltd. v. *CCE, Coimbatore* - 2007 (213) E.L.T. (41) (Tribunal) = 2007-TIOL-919-CESTAT-MAD The relevant portion is extracted from the Order -

"6. As rightly pointed out by the Counsel, the Tribunal in *CCE* v. *Asian Paints Ltd.* - 1994 (73) E.L.T. 433 (Tri.) has dealt with the case where show cause notices had been issued which had proposed to demand amounts that became the subject matter of the proceedings pursued by the department in the subsequent appeal under Section 35(E). Therefore, limitation under Section 11A would not have restricted the proceedings under Section 35(E). We find that the Tribunal has observed: "The duty was paid under protest and such payment of differential duty cannot by any stretch of imagination be termed as adjustment of duty after the final assessment thereof because the payment of duty under protest keeps the assessment alive and the protest continues till the dispute is finally settled and everything is in the fluid state. Section 11A has not come into play as the cause of action (relevant date) has not accrued or arisen so far. In the result, on the facts and circumstances of the case, the limitation prescribed under Section 35E should not be in accordance with Section 11A." In this decision the Tribunal had referred to the decision in *Re-rolling Mills* v. *Collector* - 1989 (43) E.L.T. 115 (T) and a few other orders laying down the same ratio as that decision and observed that 'these cases are distinguishable on facts as well as the language used therein'. The decision of the Larger Bench on the question referred to it was that 'on the facts and circumstances the limitation prescribed under Section 35E of Central Excise Act, 1944 should not be in accordance with Section 11A'. The Apex Court had observed in the decision in appeal by the assessee against this order that the Sections 11A and 35(E) operated in different fields and were invoked for different purposes. Their Lordships upheld the decision of the Tribunal. Therefore, the *Asian Paints Ltd.* case is distinguishable from the cases cited in para 5 above."

Para-9. In the light of Apex Court decision in the case of *Re-rolling Mills* which has been followed by various Benches of the Tribunal and the ratio laid down in the Mumbai High Court decision in the case of *Bajaj Auto Ltd.* covers the issue in favour of the assessee, we set aside the Order of Commissioner (Appeals) and allow the appeal with consequential relief, if any."

7. The ld. Counsel also relies on the in the (SMB) ruling of this Tribunal in the case of Nestlé India Ltd. Reported in 2009 (240) E.L.T. 426 (Tri.-Mumbai) were also under similar facts and circumstances where no show cause notice was issued the appeal of the assessee was allowed relying on the ruling of the Division Bench of this Tribunal in Morarjee Goculdas Spinning and Weaving (supra) and also ruling of the Apex Court in Collector versus Re-rolling Mills - 1997 (94) E.L.T. 8 (S.C.).

8. Having considered the rival contentions I hold that Show Cause Notice was required to be issued in terms of Section 11 A for demanding erroneous refund. I further find that the refund in this case vide order dated 28/12/1999 was granted by the Assistant Commissioner in terms of the order of the Honourable Tribunal. Thus the appeal of Revenue before Commissioner (Appeals) was also hit under the 'doctrine of merger'. And as such I hold the order of the Commissioner appeals is hit by the 'doctrine of merger' and as such this appeal is an abuse of the process of loss. In this view of the matter the appeal of Revenue is dismissed as no Show Cause Notice was issued.

(Dictated and pronounced in the open Court)

(ANIL CHOUDHARY)
MEMBER (JUDICIAL)

(K. Gupta)

सत्यापित प्रति / Certified True Copy

25.10.16