FAX : 0532-2400349

REGISTERED / AD

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

Dated: 08/07/2016

To

Appellant as per address in table below

Respondent as per address in table below

Final Order No. A/70310/2016-EX[DB] dated 17/06/2016

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/3099/2006	KOTHARI PRODUCTS LIMITED PAN PASAG HOUSE,24/19,THE MALL,KANPUR
		Name and Address of Respondent
2		-C.C.E. KANPUR 117/7, SARVODAYA NAGAR, KANPUR 208005.

Copy To

3 Advocate(s) / Consultant(s):

K. K. ANAND, ADVOCATE
A-103, DEFENCE COLONY,
NEW DELHI,110024

4 Bar Association, CESTAT, Allahabad

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

6 M/s Centax Publications Pvt. Ltd., 1512-B, Bhisham 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

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

REGIONAL BENCH : ALLAHABAD

Single Member Bench

Excise Appeal No. E/3099/2006-EX(DB)

[Arising out of Order-in-Appeal No.256-CE/APPL/KNP/2006 dated 29.6.2006 passed by Commissioner of Central Excise (Appeals, Kanpur]

For approval and signature:

Hon'ble Shri Anil Choudhary, Judicial Member

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?	

M/s Kothari Products Limited Appellant

Vs

C.C.E., Kanpur Respondent

Appearance:

Present for the Appellant: Ms. Surabhi Sinha, Advocate

Present for the Respondent: Shri Sanjay Hasija, Superintendent, (AR)

Coram: Hon'ble Shri Anil Choudhary, Judicial Member

Date of Hearing/Decision: 21/12/2015

Final **ORDER NO.** 70310/2016

Per: Anil Choudhary

The appellant a manufacturer of Pan Masala and Gutkha is in appeal against Order-in-Appeal dated 29/6/2006 by which it was held that there is no appealable order, as no appeal can be filed against a simple communication letter under section 35F of the Act.

2. The brief facts are that, there was a dispute as regards the classification of the product of the appellant and vide show cause notice dated 7/12/2000 additional duty was demanded. The appellant had paid the duty demand under protest totalling Rs.1,05,74,234/-. Subsequently vide order dated 31.10.2001 the Show Cause Notice was finalised and dropped. The appellant filed refund claim on 11/12/2001 for the duty paid under protest Rs.1,05,74,234/- for the period 10/10/2000 to 31/10/2000. The refund claim was rejected as time-barred and on the ground of unjust enrichment vide the Order-in-Original dated 28/02/2002. Being aggrieved the appellant preferred appeal before ld. Commissioner appeals who vide the appellate order dated 01/7/2003 allowed the appeal with all consequential relief. Pursuant to appellate order the appellant gave reminder for grant of refund on 11/4/2004 and thereafter refund for Rs.1,05,74,234/- was sanctioned and disbursed vide Order-in-Original dated 11/6/2004. As regards interest it was observed "I find that the refund in the instant case has been allowed on the basis of Commissioner (Appeals) order dated 01/7/2003 and the party have submitted their request for refund on 19/4/04 in this office hence the refund has been sanctioned within 3 (three) months of the application. Further explanation to Section 11BB provides that "where any

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order of refund is made by the Commissioner (Appeals), appellate Tribunal, or any Court against an order of the Assistant Commissioner or Deputy Commissioner under sub-section 2 of section 11 B, the order passed by the Commissioner (Appeals), Tribunal, as the case may be, by the Court shall be deemed to be an order passed under sub-section 2 for the purposes of this section. Thus the claim of interest was rejected.

3. The appellant thereafter filed an application dated 14/9/04 bringing to notice that under the provisions of section 11 BB they had entitled to grant of refund from the date ending on 3 (three) months, from filing of refund claim. As the refund claim's is allowed and disbursed on 13/7/04 they are entitled to interest from 13/3/02 (being the date when 3 months ended from the date of application) up to 13/7/04. It was further emphasised that the ld. Commissioner (Appeals) had allowed the appeal with consequential relief. In response thereto the Assistant Commissioner communicated vide his letter dated 18/1/2005 stating therein that the refund claim in their case had arisen on the basis of appellate order dated 17/3/04 and in pursuance thereto the appellant had given refund claim application on 19/4/04 and thereafter the refund was granted within 3 (three) months of the date of filing of such letter. Hence question for interest does not arise. Further

mentioning that such observations have already, been made in the refund order dated 11/6/04. Being aggrieved the appellant preferred appeal before ld. Commissioner (Appeals) who have vide the present impugned order rejected the appeal on the ground that there is no appealable order within the meaning of section 35/35F of the Act.

4. Heard the parties.

5. The ld. Counsel for appellant have argued that the issue is no longer res integra and the relevant date from which interest is payable, have been interpreted by Hon'ble Supreme Court in the case of J.K. Cement Works Vs. Assistant Commissioner of Central Excise and Customs 2004 (170) E.L.T. 4 (Raj.). Reading of Section 11 BB together with Section 11 B makes the position very clear. Section 11 BB unfolds, that the stage of making payment of refund to any claimant is reached ---- only when order under sub-section 2 of Section 11 B is made to that effect, transferring the amount of excess duty to consumer welfare fund. This is so because under the provisions of law ordinarily amount of Excise duty refunded ~~claimed~~ by the Excise Department, has to be transferred to consumer welfare fund. The assessee gets actual refund only when order is made with reference to any of the clauses of proviso to sub-section 2. Thereby setting aside the order of refund being order dated 30/9/13.

6. Learnedly DR for the revenue have argued that there is no error in the impugned order and the appeal is fit to be dismissed. He further points out from the order of the Assistant Commissioner dated 13/6/2004 stating that the claim for interest have been expressly denied and as the appellant did not file an appeal against that order, the issue has reached finality and no Interest on refund is payable.

7. Heard the Parties. I find that the impugned order is hit by the 'doctrine of merger'. The ld. Commissioner (Appeals) who is the subordinate authority than the Tribunal cannot enter into the question which has been decided by the Tribunal and have attained finality. Thus I hold that the impugned order is hit by the 'doctrine of merger' and accordingly I set aside the same. Thus the appeal is allowed in favour of the appellant. The ld. Counsel also relies on the ruling of the joint secretary, Govt. of India, Department of Revenue wherein on the question of interest, it was held, relevant date whether from 3 (three) months period of filing of claim or 3 (three) months from the date of presenting of the revision order of Government to the Assistant Commissioner, it was held interest is payable from the date immediately after the expiry of 3 (three) months from the date of receipt of refund claim of such duty. 2001 (128) E.L.T. 557 in RE : B.P.M. Industries Ltd..

9. Having considered the contentions I hold that under the doctrine of merger, the Assistant Commissioner could not have rejected the Interest on refund payable under section 11 BB in view of the clear interpretation given by the Hon'ble Supreme Court confirming the judgement of the Rajasthan High Court dated 10/2/04 and further in view of the interpretation given by the Joint Secretary, Department of Revenue, Government of India vide his order dated 7/6/2000 (supra). I also find that the Commissioner appeals is in error in holding that there is no appealable order. Any order or communication which has civil consequences on the assessee, is an appealable order.

10. Thus the appeal is allowed. The concerned authority is directed to grant interest for the period ending on 3 (three) months from the date of application dated 11/12/2001 till the date of disbursement of refund, that is 13/6/2004.

(Dictated and pronounced in the open Court)

Sd/-
(Anil Choudhary)
MEMBER (Judicial)

(K. Gupta)

प्रमाणित प्रति / Certified True Copy
15.7.16
Asstt. Registrar
C.E.S.T.A.T.
38, M. G. MARG, ALLAHABAD-211001