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

Appeal No. E/5405/2004 & 5407/2004 - EX[DB] Date 18/09/2008

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

To :
M/S PARASHURAM CEMENT LTD.
4,KIRAN ENCLAVE,BEHIND HOTEL
SAMRAT,G.T.ROAD, GHAZIABAD
201001

M/S PARASHURAM CEMENT LTD. Appellant
Vs
C.C.E.LUCKHNOW Respondent

I am directed to transmit herewith a certified copy of **Final order No.** 704 & 705/08-EX EX[BR] dated 12-8-08

passed by the Tribunal under Section 35-C(1)of Central Excises Act, 1944

Assistant Registrar
(Excise Appeal Branch)

Copy to :
1. Respondent
   C.C.E.LUCKHNOW
   5TH,8TH FLOOR KENDRIYA BHAWAN SECTOR-14,ALIGANJ,LUCKHNOW
   226024
2. Adv. / Consult
   MR.R SUDHINDER,
   C-179, BASEMENT, DAYANAND COLONY,
   LAJPAT NAGAR-IV, N. DELHI-24
3. C.D.R.
4. ~~J.C.D.R.~~
5. Bar association, CESTAT, New Delhi
6. M/s. Deeparchi Publications, M-93, Marg. 46, Saket, New Delhi 110017
7. M/s Centax Publictions (P) Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi -
8. Excise & Customs cases, B-37, Sector -1, NOIDA - 201301 Gautam Budh Nagar, (U.P.)
9. Raghuraman's 44-B, Regal Flat,Shipra Suncity, Indirapuram - 201010,Ghaziabad, DT, U.P.
10. Nidheshak publications, I.P.Estate, new Delhi
11. Taxmann Allied Service Pvt Ltd., 21/35, West Punjabi Bagh, New Delhi - 110026
12. Commercial Laws of India Pvt Ltd Post Bag No. 1033, No.70(Old No. 88), Thyagaraya Road, T. Nagar,Chennai 60017
13. Taxindiaonline.com Pvt.Ltd, B-XI/8183,Vasant Kunj, New Delhi - 110070
14. Easy Service Tax Online Dot Com Pvt. Ltd. 407A, Iscon Mall, Above Star India Bazar, Satellite Road, Ahmedabad - 15
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16. Guard file

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No.2, R.K.Puram, New Delhi-110066.
Principal Bench, New Delhi.

E/5405 & 5407/04

[Arising out of Order-in-Appeal No.186-88/CE/Lko/04 dt.4.8.04 passed by the Commissioner(Appeals), Lucknow)

For approval and signature:

Hon'ble Mr. S.S.KANG, VICE PRESIDENT
Hon'ble Mr. RAKESH KUMAR, MEMBER(TECHNICAL)

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 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. Parashuram Cement Ltd. Appellant

Versus

CCE, Lucknow Respondent

Appearance

Shri Sudhinder, Adv. For appellant
Shri M.M.Singh, Authorised Departmental Representative(DR) For respondent

Coram: Hon'ble Mr. S.S.KANG, VICE PRESIDENT
Hon'ble Mr. RAKESH KUMAR, MEMBER(TECHNICAL)

Date of hearing: 12.8.08
Date of decision:
Final Order No. 704-705/08-EX

Per Rakesh Kumar:

The Appellants have a 'mini cement plant using vertical shaft kiln' with capacity not exceeding 16,500 m.t. per annum as certified by Director of Industries, U.P., Kasganj – Etah Road, Nadrai, Etah. Notification 4/97-CE dt.1.3.97(S.No.6) prescribes a concessional rate of duty of Rs.200 per m.t. for cement manufactured in a cement plant with vertical shaft kiln, with installed capacity not exceeding 300 m.t. per day or 99,000 m.t. per annum. They filed a declaration dt.1.4.97 under Rule 173B of Central Excise Rules,1944 for availing notification 4/97-CE w.e.f. 1.4.97. On 27.6.97, notification 38/97-CE was issued which prescribed concessional rates of duty of '60% of normal duty' and '80% of normal duty' for different [illegible] slabs, [illegible] aggregate value, not exceeding rupees one crore, in a financial year and 'normal duty' as defined in the notification means the tariff rate read with relevant exemption notification(other than the exemption notification in which exemption is based on quantity or value of clearances). The Appellant, on 16.7.97 filed a revised Rule 173B declaration opting to avail the benefit of Notification 4/97-CE as well as 38/97-CE, without realizing that with the issue of Notification 38/97-CE, a condition had been inserted in notification No. 4/97-CE that benefit of this notification(i.e. notification 4/97-CE) shall not be available for the cement in respect of which notification No.38/97-CE has been availed. Besides this, while the

Appellant, under Notification No.38/97-CE, was required to pay duty at the rate of 60% or 80%, as the case may be, the tariff rate of Rs.350 per m.t., they were actually paying duty at the rate of 60%/80% of Rs.200 per m.t. It is in view of this, that a show cause notice dt.29.4.98 was issued to them for –

(a) denying the benefit of notification No.4/97-CE, and charging duty at the rate of 60% or 80% of the tariff rate under Notification No.38/97-CE and on the basis, recovery of short paid duty of Rs.3,52,476/- for the period from Oct'97 to March'98 from the Appellants alongwith interest on this duty;

(b) imposing penalty on them under Rule 173Q(1)

1.1 Another show cause notice dt.11.6.98 for demanding short paid duty amounting to Rs.1,89,870/- was issued in respect of period from July'97 to Sept'97.

1.2 Both the Show Cause Notices were adjudicated by the Addl. Commissioner vide order-in-original dt.28.2.2000, by which the duty demands were confirmed and penalty of equal amount was imposed. The Addl. Commissioner, vide two orders-in-original, each dt.28.2.2000, confirmed two more duty demands on this issue, of Rs.60,777/- and Rs.5,35,701/- pertaining to periods – from April'98 – May'98 and June '98 – March'99 respectively. The Appellants filed appeals against these orders. The Commissioner of Central Excise(Appeals), vide a common order-in-appeal No.186-188-CE/APPL/LKO/04 dt.4.8.04 upheld the duty demands only for normal limitation period and set aside the penalties on the Appellants under Section 11AC. However, the Appellants' plea for permitting the availment of the more beneficial notification No.4/97-CE was rejected. It is against this order that these three appeals have been filed.

2. Heard both sides.

2.1 Shri Sudhinder, Advocate, the learned counsel on behalf of the Appellants while conceding that the Appellants could not avail of both the exemption notifications No.4/97-CE as well as No.38/97-CE, pleaded that the appellants were under bonafide impression that they could avail of both the exemption notifications simultaneously and that 'normal duty' referred to in the notification No.38/97-CE was Rs.200/- per m.t. as allowed vide notification 4/97-CE, that had the Appellants been aware that benefit of notification No.38/97-CE was not available while availing notification No. 4/97-CE, they would never have opted to avail notification No.38/97-CE as notification 4/97-CE was more beneficial for them, that since the Appellants had declared their intention to avail of both the notifications simultaneously in the Rule 173B declaration dt.16.7.97, this shows that they had not concealed anything from the Department and that they continued to avail both the exemptions simultaneously as the Department did not raise any objection in respect of their declaration, that the Department has wrongly quantified the duty demands against the Appellants by forcing the exemption notification No.38/97-CE upon them, while they, on learning that they cannot avail of exemption under notification No.38/97-CE while availing notification No.4/97-CE, had opted to avail of 4/97-CE, as this notification is more beneficial to them and that when two different exemptions are available to an assessee, it is open to the assessee to choose which one is more beneficial to him and avail that notification as in this regard, reliance is placed on Tribunal's judgment in case of Modi Zerox Ltd. vs CCE, Meerut reported in 1997(94)ELT.139.

2.2 Shri M.M.Singh, the learned Departmental Representative opposing the Appellants' contention pleaded that since the Appellants were earlier availing of notification No.4/97-CE which had a rider that this exemption will not be available in respect of the goods in respect of which duty exemption under notification No.38/97-CE has been availed and since while availing of exemption notification No.4/97-CE, the Appellants admittedly also started availing duty exemption under notification No.38/97-CE, the Appellants have to be denied the benefit of notification No.4/97-CE and asked to avail of notification No.38/97-CE and therefore, the duty demands have been rightly confirmed by applying the rate of duty under notification No.38/97-CE. It was emphasized that if the Appellants wanted to avail of notification No.4/97-CE, they should not have opted to simultaneously avail of notification 38/97-CE also, and once having done so, they go out of the notification 4/97-CE and have to avail of notification 38/97-CE only.

3. We have carefully considered the submissions from both the sides. The Appellants during 1997-98 had initially filed a declaration for availing the benefit of notification No.4/97-CE w.e.f. 1.4.97. Subsequently, when notification No.38/97-CE dt.27.6.97 was issued, they filed a declaration dt.16.7.97 for availing both the notifications simultaneously i.e. notification No.4/97-CE as well as notification No.38/97-CE without realizing that the benefit of notification No.4/97 was available subject to condition that the benefit of notification No.38/97-CE is not availed. Notification No.4/97-CE prescribes a concessional rate of duty of Rs.200/- per m.t. for mini cement plants with vertical shaft kiln with installed capacity not exceeding 300 m.t. per day and notification No.38/97-CE which was also applicable to the appellants, prescribes concessional rate of duty from 60% of the normal duty to 80% of the normal duty, in respect of first clearances upto value of Rs.one crore in a financial year and the 'normal duty' as per the definition of this expression given in the notification would, in this case, be the tariff rate i.e. Rs.350/- per m.t. The Appellants were , however, paying duty @ 60% or 80% of Rs.200/- instead of 60% or 80% of Rs.350/- per m.t. When this irregularity was detected by the Department, the Department has denied the benefit of notification 4/97-CE and has determined their duty liability on the basis of notification No.38/97-CE while the

Appellants' plea is that since both the notifications are applicable to them and since notification 4/97-CE is more beneficial to them, their duty liability should be determined under notification No.4/97-CE and not under notification No.38/97-CE.

4. There is no dispute about the fact that initially the Appellants were availing of notification 4/97-CE as per the declaration under Rule 173B filed by them. It is only subsequently when the notification No.38/97-CE dt.27.6.97 was issued that they filed revised declaration for availing the benefit of notification No.38/97-CE as well as No.4/97-CE. But since with the issue of notification No.38/97-CE, notification No.4/97-CE had been amended and a clause has been inserted in it to the effect that the benefit of notification No.4/97 would not be available in respect of the goods for which benefit of notification No.38/97-CE has been availed, the Department should not have allowed the Appellants to avail of notification No.38/97-CE alongwith notification No.4/97-CE. Since the Appellants are eligible for both the exemption notification and initially they were availing of Notification No.4/97-CE and subsequently due to ignorance, they also filed a declaration for simultaneous availment of notification No.38/97-CE, it would not be correct, while denying simultaneous availment of both the notifications, to force the Appellant to avail the notification No.38/97-CE, wheras the Appellants wanted to continue under notification No.4/97 as the same was more beneficial to them. The Tribunal in the case of Modi Xerox Ltd. vs CCE, Meerut

reported in 1997(94)ELT.139 has held that when there are two different exemption notification available to an assessee, it is open to the assessee to choose to avail the one which is more beneficial to him. In view of this, we hold that the lower authorities' decision forcing the notification No.38/97-CE on the appellants and denying the benefit of notification No.4/97 to them, which they wanted, is not correct and the Appellants should have been allowed during the period of dispute, to discharge their duty liability under notification No.4/97-CE. We, therefore, set aside the impugned order and remand the matter to the Commissioner(Appeals) for requantifying the duty liability of the Appellant during the period of dispute under notification No.4/97-CE. The appeals stand disposed as indicated above.

(Operative part of the order pronounced in the open court)

(S.S.Kang)
Vice President

(Rakesh Kumar)
Member Technical

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