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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/1311/2009-1312/2009 - EX[DB] & E/S/1327-1328/2009-EX   Date 22/07/2009

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

To :
M/S ANNAKUT BISCUIT CO. PVT. LTD.
54-A, UDYOG NAGAR CO-OP. INDUSTRIAL ESTATE,
VIVEKANAND NAGAR, KANPUR-208002.

M/S ANNAKUT BISCUIT CO. PVT. LTD. Appellant
Vs
C.C.E. KANPUR   STAY ORDER NO.725-726/2009-EX   Respondent

I am directed to transmit herewith a certified copy of **Final order No.** 474-475/2009- **EX[DB]** dated 24-6-09 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. KANPUR
   117/7, SARVODAYA NAGAR, KANPUR 208005.
2. Adv. / Consult SH. M. H. PATIL, ADV.,
   P. O. BUILDING, 2ND FLOOR,
   ANDHERI-KURLA ROAD, J.B.NAGAR,
   ANDHERI (EAST), MUMBAI-59
3. C.D.R
4. ~~J.C.D.R.~~
5. Bar association, CESTAT, New Delhi
6. Director Publications, Customs, Excise. I.P. Estate, New Delhi
7. M/s Centax Publictions Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi - 3
8. Commercial Laws of India Pvt Ltd. Post Bag No. 1033, No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
9. Raghuraman's 44-B, Regal Flat,Shipra Suncity, Indirapuram - 201010,Ghaziabad, DT, U.P.
10. M/s Manupatra Information Solutions Pvt Ltd. Excise & Customs Cases B-37, Sector - 1, Noida - 201301, Gautam Budh Nagar, (UP)
11. M/s. Deeparchie Publications, M-93, Marg. 46, Saket, New Delhi 110017
12. Taxindiaonline.com Pvt.Ltd, B-XI/8183,Vasant Kunj, New Delhi - 110070
13. Taxmann Allied Service Pvt Ltd., 21/35, West Punjabi Bagh, New Delhi - 110026
14. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road,Ahmedabad-15
15. LAWCRUX Advisors Pvt Ltd, LAW House,1-8,Sector - 10, Faridabad 121003 (Haryana)
16. Office Copy
17. Guard file

Assistant Registrar
(Excise Appeal Branch)

18. SHRI NAVEEN KHANNA, DIRECTOR OF
    M/S ANNAKUT BISCUIT CO. PVT. LTD., 54-A, UDYOG NAGAR CO-OP.
    INDUSTRIAL ESTATE, VIVEKANAND NAGAR, KANPUR

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI, PRINCIPAL BENCH NEW DELHI

Excise Stay Applications Nos.1327-1328 of 2009-Excise in Excise Appeals Nos.1311-1312 of 2009-Excise Branch

[Arising out of Order-in-Appeal No.14/Commr./MP/2008 dated 22.01.2009 passed by the Commissioner of Central Excise, Kanpur]

Date of Hearing/ Decision: 24.06.2009

For approval and signature:

Hon'ble Mr. M. Veeraiyan, Member (Technical)
Hon'ble Mr. P.K. Das, Member (Judicial)

1. Whether Press Reporters may be allowed to see CESTAT (Procedure) Rules, 1982.		
2. Whether it should 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?	:	
4. Whether Order is to be circulated to the Departmental authorities?	:	Yes

(1) M/s. Annakut Biscuit Co. Pvt. Ltd.
(2) Shri Naveen Khanna, Director ...Appellants
(Rep. by Shri M.H. Patil, Advocate)

Vs.

CCE, Kanpur ....Respondent
(Rep. by Shri K.P. Singh, DR)

CORAM: **Hon'ble Mr. M. Veeraiyan, Member (Technical)**
Hon'ble Mr. P.K. Das, Member (Judicial)

STAY Order No.725-726/09-EX/Dated:24.06.2009
FINAL ORDER NO 474-475/09-EX

Per P.K. Das:

After hearing both the sides, we find that the issue involved in this case is in narrow compass and, therefore, after granting stay, the appeals are taken up itself for disposal.

2. The appellants are engaged in the manufacture of Glucose Biscuits, Elaichi Cream Biscuits and Orange Cream Biscuits. The issue involved in this case is as to whether the intermediate product viz. cream used in the Cream Biscuits would be classifiable under Heading No.2106.90 of the Schedule to the Central Excise Tariff Act, 1985. The main contention of the appellant is that the cream is not marketable and, therefore, it is not excisable. The Commissioner confirmed the demand of duty for the period May, 2007 to February, 2008, cream consumed captively in the manufacture of biscuits and also imposed penalty of equal amount and a penalty was also imposed on the Director of the appellant company, appellant no.2

3. Ld. Advocate on behalf of the appellants submits that they have taken a definite stand before the Original Authority that cream is not marketable and it has a short live of 24 hours. In this connection, he drew the attention of the Bench to the relevant portion of the Adjudication Order and reply to the show cause notice. He also submits that it is well settled by the various decisions of the Hon'ble Supreme Court, High Court and Tribunal that the onus lies on the Revenue to establish marketability of goods. It is his contention that in the present case, Revenue failed to discharge burden of poof lies on them.

4. Ld. DR reiterates the findings of the Commissioner. He submits that the cream is captively used in the finished goods. He also submits

that the similar cream is marketed by the other company. He also submits that the composition of the cream is clearly indicating marketability.

5. After hearing both the sides and on perusal of the records, we find that in reply to the show cause notice, the appellant took a definite stand that cream has short live of 24 hours. It is not marketable. For proper appreciation, the relevant portion of the said reply is reproduced below:-

> "5. As regards observations of the AC vide letter dated 11.11.2008 on shelf-life of cream, it is submitted that cream after 24 hours lose softness and would get harder unable to apply on biscuit-shells and would not stick to the shell of cream-biscuit. Therefore, evenafter having shelf-life the usability of cream for the purpose of filling in cream-biscuit, would not last after 24 hours. As regards marketability of cream made for captive use within factory, it is submitted that cream made of specific formula of ingredients suitable for use into cream-biscuits made by us, such cream could not be sold to others, as ingredient-mix, taste, flavour, etc. of each variety of cream differs and hence such ready to use-cream is neither saleable nor known to the market for the purpose of buying and selling it. It is a settled law that item/product not marketable, could not be subjected to excise duty."

6. It is revealed from the impugned order that the jurisdictional Asstt. Commissioner submitted his report to the office of the Commissioner, in which he opined that the appellant is manufacturing the cream in question for its own use only but he did not rule out the possibility of the marketing of the cream and stated that the same is marketed by other biscuit manufacturers, bakers, etc. to be used as filler. It is observed by the Commissioner that the appellant is not selling the product in question in the market yet the possibility of the marketing of the product cannot be ignored completely.

7. It appears that no sample of the cream was drawn by the Revenue and no market enquiry was conducted. It appears that the Commissioner proceeded on the basis of the report of the Asstt. Commissioner, which indicates that there is a possibility of the marketability of the product. We find that the Commissioner passed the order on the basis that the cream is classified under Heading No.2106.90. The issue of marketability was not examined by the Commissioner properly. It is well settled that onus lies on the Department to establish the marketability. In this connection, the relevant portion of the decision of the Hon'ble Supreme Court in the case of Hindustan Zinc Ltd. Vs. CCE reported in 2005 (181) ELT 170 (SC):-

> 10. This seems to suggest that some market enquiry was made. However, it could not be shown to us what that market enquiry was. The above statement also shows that silver chloride sold in the market had 75% silver content. In the present case, the department has made no efforts to ascertain whether silver chloride emerging from the treatment adopted in the assessee's factory, having 50% to 53% silver content, had a market. Mathematical ratio between total quantity of silver chloride and silver content cannot be establish marketability. The burden was on the department to prove such marketability. In the circumstances, on facts, we hold that the department has failed to prove the test of marketability."
>
> 15.

8. In the case of Moti Laminates Pvt. Ltd. Vs. Collector of Central Excise reported in 1995 (76) ELT 241 (SC), the Hon'ble Supreme Court had held as under:-

> " Since the test of marketability or capable of being marketable applies even to those goods which are mentioned in the tariff item the intermediate resin produced by the appellants which are mentioned as resols under Tariff Item No.15 A were not exigible to duty. The finding of the Tribunal that once the product

> manufactured by the appellants answered the chemical description of the product under Tariff Item 15 A it was assessable to duty whether it was marketable or not was thus not well founded"

9. In view of the above discussions, we find that the Original Authority failed to examine the issue of marketability in proper manner. To meet the ends of justice, it is fit and proper that the matter should be remanded to the Commissioner of Central Excise to examine the marketability in the light of the above decisions. Both the appeals are allowed by way of remand. Needless to say that Commissioner shall give proper opportunity before decision. All issues are left open. The stay applications are disposed of.

Order dictated & pronounced in open court on 24.06.2009.

(M. Veeraiyan)
Member (Judicial)

(P.K. Das)
Member (Judicial)

Ckp.