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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

Date 10/11/2009

Appeal No. E/75 /2005 - EX[DB]

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

To :
C.C.E.ALLAHABAD U.P.
38,M.G.MARG CIVIL LINES ALLAHABAD U.P

C.C.E.ALLAHABAD U.P. Appellant
Vs
M/S J.H.V.SUGAR CORPN.LTD. Respondent

I am directed to transmit herewith a certified copy of **Final order No.** 873/ **2009 EX[DB]** dated 15-10-09 passed by the Tribunal under Section 35-C(1)of Central Excises Act, 1944

Assistant Registrar
(Excise Appeal Branch)

Copy to :
1. Respondent
M/S J.H.V.SUGAR CORPN.LTD.
GASAURA MAHARAJGANJ U.P
2. Adv. / Consult

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
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18.HON'BLE PRESIDENT

Assistant Registrar
(Excise Appeal Branch)

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI
COURT NO.II

E/Appeal No. 75/2005-Ex

(Arising out of order in appeal No.640/CE/Alld/2004 dated 6.10.2004 passed by the Commissioner of Central Excise (Appeals), Allahabad)

Hon'ble Sri Justice R.M.S. Khandeparkar
Hon'ble Sri.Rakesh Kumar , Technical Member

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 the 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

CCE, Allahabad — Appellant

Vs

M/s J.H.V. Sugar Corp Ltd — Respondent

Appeared for the Appellant : Shri K.P. Singh, SDR
Appeared for the Respondent : None
Amicus Curie
Shri L.P. Asthana, Advocate
Shri Abishek Jaju, Advocate

Coram: **Hon'ble Sri. Justice R.M.S. Khandeparkar, President**
Hon'ble Sri. Rakesh Kumar, Technical Member

Date of Hearing: 15.10.09

Final Order No. 873/09 /2009

Per Justice R.M.S.Khandeparkar:

This appeal arises from order dated 6.10.2004 passed by the Commissioner (Appeals), Allahabad whereby the appeal filed by the respondents against the order of the original authority dated 16.6.2004 has been disposed of while holding that the respondent had contravened the provision of Rule 6 of Cenvat Credit Rules, 2001 by suppression of the relevant transactions and that therefore the demand of Rs.8,21,876/- was confirmed while reducing the penalty to the tune of Rs.1 lakh. The Original Authority had confirmed the demand of Rs.13,79,660/- and also imposed penalty of equal amount. The Commissioner (Appeals) has held that the demand for the period 1999-2000 till June, 2001 was not sustainable as there was no machinery provision under the Central Excise Act or the Rules made thereunder for the recovery of the amount of 8% of the sale value of the final product payable in terms of proviso to Rule 6 of Cenvat Credit Rules prior to 1st July, 2001.

2. When the matter came up for final hearing on 14th October, 2009, nobody appeared on behalf of the respondent and since the matter involved an important question of law, we found it proper to seek assistance of an amicus curie in the matter and we requested Shri L.P. Asthana, learned Counsel to assist the Tribunal in the matter. Learned Counsel readily accepted our request and that is how we have heard the learned Advocate as well as the learned DR in the matter. At the outset, we place on record our

appreciation and thanks to Shri L.P. Asthana for the able assistance rendered to the Tribunal in the matter.

3. The point involved in the matter is whether the respondents had no liability to pay the amount at 8% of the sale value of the product in question for the period prior to 1st July, 2001 on the ground that there was no machinery provision for the recovery of the said amount under the Central Excise Act or the Rules made thereunder.

4. The learned Commissioner in the impugned order while dealing with the said issue, has held that the Cenvat Credit Rules, 2001 came into force from 1st July, 2001. Under Rule 6 thereof, it is specifically provided that if the manufacturer fails to pay the said amount, it should be recovered alongwith interest in the manner as provided in Rule 4 for recovery of the Cenvat Credit already taken. However, since the said proviso came into force with effect from 1st July, 2001, the demand for the period from 1999-2000 to June, 2001 is not sustainable. In other words, the Commissioner (Appeals) has held that prior to 1st July, 2001, there was no machinery provision for recovery of the amount payable in terms of Rule 6 of the said Rules read with Rule 57-CC and/ or Rule 57-AD of the erstwhile Central Excise Rules, 1944.

5. The learned Advocate drawing out attention to Section 82 of the Finance Act, 2005 submitted that under the said provision of law, the Parliament had specifically introduced the machinery provision for enforcement of the obligation of the manufacturer in terms of Rule 6 of the said Rules read with Rule 57-CC and Rule 57-AD of the said Rules and the same was made enforceable

retrospectively. Drawing our attention to the relevant amendment as incorporated under Section 82 of the Finance Act, 2005 and particularly to the Fourth Schedule thereof, the learned Advocate submitted that necessary machinery provisions for implementation of the law comprised under Rule 57-AD as well as Rule 57-CC of Central Excise Rules, 1944 as also Rule 6 of Cenvat Credit Rules, 2001 were brought on the Statute book and therefore, the finding arrived at by the Commissioner (Appeals) about the absence of machinery provisions for enforcement of the provisions under Rule 6 read with Rule 57-AD and Rule 57-CC are not sustainable pursuant to the amendment having been brought into force retrospectively. He further submitted that undoubtedly the Commissioner (Appeals) had no opportunity of having before him the amended provisions of law when the matter was disposed of as the amendment was introduced subsequent to the passing of the impugned order. However, the same being retrospectively enforceable, the finding cannot be sustained as of today.

6. He further submitted that it has been clearly held by the Madras High Court in the case of Eternit Everest Ltd Vs Union of India reported in 1997 (89) ELT 28 (Mad) that in the absence of machinery provision, question of taking action under Central Excise Act cannot arise and the said ruling was not stayed by the Apex Court though SLP against the same was admitted.

7. Learned DR submitted that the Commissioner (Appeals) erred in ignoring the decision of the Tribunal in the matter of Commissioner of Central Excise Jaipur-II Vs Maa Kamakhya Marbles (P) Ltd reported in 2004 (170) ELT 580 whereby it was

clearly held that machinery for realisation of 8% amount in terms of Rule 57-AD was provided in the Central Excise Rules, 1944 themselves. Being so, according to the learned DR, the impugned order for the period prior to 1st July, 2001 should be set aside and the order in that relation of the original authority should be confirmed.

8. Learned Advocate also submitted that provision of law as far as they relate to the liability to pay the amount of 8% of the value of the final product in terms of Rule 6 of the said Rules or the corresponding Rule 57-AD and 57-CC are concerned, there is no provision for imposition of penalty as such in relation to the failure to pay the same or in case of delay in demand thereof. Being so, according to the learned Advocate, the power exercised for imposition of penalty do not find support from the provisions of law.

9. As rightly submitted by the learned Advocate, the provision of law were amended under the Finance Act, 2005 whereby in terms of Section 82 thereof, specific provisions were introduced to make the liability of the manufacturer in terms of Rule 6 of the said Rules enforceable, alongwith the corresponding provisions in relation to the Rule 57-AD and 57-CC as they were made enforceable retrospectively. As regards the obligation under Rule 57-CC is concerned, the machinery provision brought in were made effective from 1st August 1996 onwards till 31st March, 2000. As regards the machinery provision relating to Rule 57-CC and 57-AD, they were made effective from 1st April, 2000 till 30th June, 2001. As regards Rule 6 of the said Rules are concerned, they are

made enforceable from 1st July, 2001 to 20th February, 2002. For subsequent period, there is also provision under relevant statute and rules made thereunder. Equally it is true that when the refund order was passed, these provisions were not before the Commissioner (Appeals). However, in view of the fact that the amendment has been brought into force retrospectively and the present appeal being continuation of proceedings which came before the adjudicating authority and continued before the Commissioner (Appeals) and the amended provisions being related to procedural law, the same would apply to the pending proceedings and therefore, would apply to the matter in hand. Obviously, therefore, the finding that the respondent was not liable to pay the said amount in terms of Cenvat Credit Rules or the Rule 6, 57-CC or 57-AD prior to 1st July, 2000 cannot be sustained and is liable to be set aside while restoring the findings arrived at by the adjudicating authority.

10. It is true that we are dealing with the appeal filed by the Department and the assessee has not filed any appeal or cross objection in the matter. However, as the appellant has brought to our notice the fact that the authorities below have proceeded to impose penalty inspite of the fact that in such cases, there cannot be any occasion for imposition of penalty in view of the fact that the failure and/or delay to pay the amount was in absence of the statutory provision regarding the procedure for the same. It is not related to any other amount provided either under the said Act or the Rules made thereunder. Being so, the order imposing penalty is totally *ab-initio* void and the same being brought to our notice, it

would be the duty of the Tribunal not to allow any injustice being caused to the party even though the party has failed to appear and raise the point. In such situation, the order imposing of penalty cannot be sustained. Besides, it is also to be noted that though the party has not challenged the imposition of penalty, the department has made grievance about the reduction in the penalty by the Commissioner (Appeals). Certainly, it is to be considered whether the authority was at all justified in imposing the penalty.

11. In the result, therefore, the appeal partly succeeds as far as the impugned order relating to reduction of the demand from Rs. 13,79,660/- to Rs. 8,21,876/- is concerned, and the same is therefore, set aside and the demand made by the adjudicating authority is restored and confirmed. However, as far as the imposition of penalty is concerned, the order passed by the Commissioner (Appeals) and by the original authority are set aside. The appeal is disposed of in the above terms.

(Order dictated and pronounced in the open Court).

(Justice R.M.S.Khandeparkar)
President

(Rakesh Kumar)
Technical Member

MPS*