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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 01/10/2009

Appeal No. E/3096/2004 - EX[DB]

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

To :
C.C.E. KANPUR
117/7 SARVODAYA NAGAR, KANPUR

C.C.E. KANPUR — Appellant

Vs

M/S PREMIUM SUITING PVT. LTD. — Respondent

I am directed to transmit herewith a certified copy of **Final order No.** 755 **2009 EX[DB]** dated

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 PREMIUM SUITING PVT. LTD.
   G-6, UPSIDC INDUSTRIAL AREA, JAINPUR KANPUR
2. Adv. / Consult SH. RUPESH KUMAR, ADV., 46, BANK ENCLAVE, N. DELHI-92
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
18. HON'BLE PRESIDENT

Assistant Registrar
(Excise Appeal Branch)

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
WEST BLOCK NO.II, R.K. PURAM, NEW DELHI-110066.
BENCH-DB

Excise Appeal No.3096 of 2004

(Arsing out of Order-in-Appeal No.363-CE/Appl/KNP/2003 dated 31.12.2003 passed by the Commissioner of Central Excise, Allahabad

Date of Hearing/Decision: 20.08.2009

For approval and signature:

Hon'ble Mr. Justice R.M.S.Khandeparkar, President
Hon'ble Mr.B.S.V.Murthy, 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 should 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 Departmental authorities?	

Commissioner of Central Excise, Kanpur — Appellant

Vs.

M/s. Premium Suiting Pvt.Ltd. — Respondent

Present for the Appellant: Shri Rupesh Kumar, Advocate
Present for the Respondent: Shri A.Khanna, DR

Coram:Hon'ble Mr. Justice R.M.S.Khandeparkar, President
Hon'ble Mr.B.S.V.Murthy, Member (Technical)

FINAL **ORAL ORDER NO.** 755/09-Ex

PER: B.S.V. MURTHY

The respondent was engaged in the processing of man made fabrics and after the introduction of Hot Air Stenter Textile Processors Annual Capacity Determination Rules, 1998 with effect from 10.12.1998, annual production capacity ('APC' for short) in respect of the assessee was determined by the Commissioner on 29.3.1999. The respondent paid duty as per annual production capacity but subsequently filed a refund claim on the ground that the length of galleries should not have been included while determining the annual production capacity. The refund claim was rejected by the original adjudicating authority but allowed by the Commissioner (Appeals) relying upon the decision of the Hon'ble Supreme Court in the case of CCE, Jaipur-II vs. SPBL Ltd. reported in 2002 (146) ELT 254 (SC). The Hon'ble Supreme Court had observed that the length of galleries need not be included for the purpose of determination of annual production capacity. Against this order of the Commissioner (Appeals), the Revenue filed an appeal before the Tribunal. Hence, this Tribunal vide Final Order No.310/08-Ex dated 28.4.2008 allowed the appeal of the Revenue. Thereafter the respondent filed an appeal before the Hon'ble Allahabad High Court who remanded the matter to this Tribunal to reconsider the issue. While remanding the matter, the Hon'ble High Court observed that the Tribunal had not taken note of the fact that the assessee was discharging the demand of duty on stenter of galleries and had treated the said order of the Commissioner as interlocutory order subject to final decision on the verification of technical expert. Further, the Hon'ble High Court has also observed that the appellant had filed fresh declaration and have claimed re-determination on the basis of amendment in the Rules and the decision of the Tribunal in the case of Chiman Lal Silk Mill (I) (P) vs. CCE reported in 2000 (120) ELT 766 (Hyderabad) was also not taken into account.

2. We have heard both sides.

3. The learned DR on behalf of the Revenue submits that the assessee had not filed the appeal against the order of the Commissioner (Appeals) determining the APC on 29.3.99 and this was appealable order. Therefore, in terms of the decision of the Hon'ble

Supreme Court in CCE, Kanpur vs. Flock India Pvt.Ltd., the decision of the Tribunal allowing the appeal earlier is correct. He also submits that the assessee could not have paid under protest once an order has been passed and an appealable order cannot be challenged by filing a refund claim. He submits that the amendments made in the Rules in 2000 are only prospective and therefore are not applicable to the assessee. However, he also submits that if the refund claim is required to be considered the aspect of unjust enrichment is also required to be considered and the Commissioner(Appeals) has not taken the this aspect.

4. The respondents have also filed cross objection and on behalf of the respondents it was submitted by the learned Counsel that in their letter dated 22.4.99 while intimating they had submitted that they are paying duty under protest. Thereafter a refund claim, a show cause notice was issued and in reply to the show cause notice they had informed the department that they had paid duty under protest in view of the fact that the order of the Commissioner (Appeals) did not give the details regarding report of the technical expert and report of the field formation while issuing the order. Further, he also submitted that they had not got appealable order. He also submitted that they had paid duty under protest shows the request for revised order. However, he also submitted that in terms of Section 3A, the Commissioner is empowered to re-determine the APC whether assessee claims actual production of notified goods in the factory lower than the production after giving an opportunity to the assessee to produce evidence in support of his claim. Therefore, it is their submission that once they had paid duty under protest and had replied to the show cause notice contesting fixation of APC itself, APC should have been re-determined. He also submits that relying upon the

decision of the Hon'ble Bombay High Court in the case of Om Textile Pvt.Ltd. vs. CCE reported in 2006 (74) RLT 233 in support of his contention that based on the Supreme Court decision refund should have been granted to them. He also submits that their case is similar to the case of Om Textile Pvt.Ltd.

5. The learned DR in his rejoinder submits that the case of Om Textile Pvt.Ltd. was considered by the Tribunal while passing the order and therefore the same is not applicable to the facts of the present case.

6. We have considered the submissions made by both sides.

7. In this case, the respondents have paid differential duty under protest after determining APC. The respondents failed to file appeal against the order of the Commissioner (Appeals). The question that has to be determined is when they have not filed the appeal they are not entitled to refund or not. In the case of Om Textile Pvt.Ltd., the facts were also similar, but the difference was only that in Om Textile Pvt.Ltd case, the assessee had not paid duty as per APC including galleries based on the order fixing APC. A show cause notice was issued and demand was confirmed against the assessee, the issue went upto the Hon'ble Bombay High Court and the same was determined in favour of the assessee. In this case, the assessee have paid the amount and filed refund claim. Thus only difference in the two cases is that in one case the party did not pay duty in this case the assessee paid duty and filed refund claim. Thus, we feel that Om Textile Pvt.Ltd decision would be applicable to the present case also.

8. Next question to be determined whether in the light of the facts and circumstances of the case, the decision of the Hon'ble Supreme Court in CCE, Kanpur vs. Flock India Pvt.Ltd. is applicable or not. In this connection, we note that the Hon'ble High Court has observed that as soon as the law is declared by the Hon'ble Supreme Court it gives immediately substantive right to the appellant to raise such issue before the appropriate forum for adjudication. The presumption against retrospective operation is not applicable to declaratory statutes. A substantive right as accrued by the appellant is clarificatory in nature. Curative statutes are by their very nature are intended to operate upon and affect past transactions and are therefore, fully retrospective. Curative and validating statutes operate on conditions already existing and can have no prospective operation. It is well settled that if a statute is curative or merely declares the previous law, retroactive operation would be more rightly ascribed to it than the legislation which may prejudicially affect past rights and transactions.

9. In their decision, Om Textile Pvt.Ltd. the Hon'ble Bombay High Court has observed that even the appellant in that case also did not challenge the correctness of the order of the Commissioner in independent substantive proceedings, by the time the matter reached to the Tribunal, the Tribunal was competent to consider and rather ought to have considered the applicability of law laid down by the Supreme Court in the case of SPBL Limited to the facts of the present case.

10. In view of the above, we do not find substance in the contention on behalf of the Revenue, as far the merits of the case is concerned. However, the matter has to be remanded to the original adjudicating authority in view of the fact that Commissioner (Appeals) in his order did not

consider whether the appellants have passed on the duty liability to their customers or not and whether the grant of refund would amount to unjust enrichment. In view of the decision of the Hon'ble Allahabad High Court while remanding the case to consider the issue in the light of the decision in the case of Mafatlal Industries Ltd. case, we direct the original adjudicating authority shall consider refund claim in the light of the decision in Mafatlal Industries Ltd. case and examine the aspect of unjust enrichment, and only for that purpose, we remand the matter to the original adjudicating authority. The appeal is disposed of in above terms.

(JUSTICE R.M.S.KHANDEPARKAR)
PRESIDENT

(B.S.V.MURTHY)
MEMBER (TECHNICAL)

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