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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 18/12/2009

Appeal No. E/461 /2005 - EX[DB]

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

To :
M/S KHATRI KIMAM CO. PVT. LTD.
RAJADEEH, BISWAN, SITAPUR, U.P.

M/S KHATRI KIMAM CO. PVT. LTD. Appellant

Vs

C.C.E. LUCKNOW Respondent

I am directed to transmit herewith a certified copy of **Final order No. 1389/ 2009 EX[DB]** dated 01-12-09 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. LUCKNOW
   7-A, ASHOK MARG, LUCKNOW.
2. Adv. / Consult
   MR.RAJESH CHHIBBER
   FA/9, NEW KAVI NAGAR, GHAZIABAD
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)

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

Excise Appeal No.461/05

[Arising out of Order-in-Appeal No.415-CE/LKO/2004 dated 29.11.04 passed by the Commissioner(Appeals),Lucknow)

For approval and signature:

Hon'ble Mr. Justice R.M.S.Khandeparkar, 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? Yes

2. Whether it would 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 Department Authorities: : Yes

M/s. Khatri Kimam Co. P.Ltd. Appellants

Versus

CCE, Lucknow Respondent

Appearance

Sh. Rajesh Chhibber, Adv. for Appellant

Sh. A. Khanna, Authorised Departmental Representative(DR) For Respondent

FINAL Date of decision: 1.12.09
Oral Order No. 1389/09-EX

Per Justice RMS Khandeparkar:

Heard learned Advocate for the appellants and learned DR for the Revenue.

2. The short point which is sought to be raised in the matter is that whether the Notification No.5/2001-CE dated 1.3.2001 can be enforced retrospectively. The facts in brief relevant for the decision are that the appellants are the manufacturer of preparations containing chewing tobacco commonly known as unbranded 'kimam' and 'chewing tobacco' classifiable under Chapter sub-heading 2404.41 of the Central Excise Tariff Act,1985. The unbranded chewing tobacco and preparations containing chewing tobacco were subjected to National Calamity Contingent Duty at the rate of 10% ad valorem by virtue of Section 129 of the Finance Bill,2001. During the period from July'2001 to February'2002, the appellants manufactured 34667 kgs. of unbranded kimam and 22480 kgs. of unbranded chewing tobacco totally valued at Rs.52,68,270/-. They were, however, cleared without payment of NCC Duty. Subsequently, a show cause notice came to be issued demanding duty to the tune of Rs.5,26,827/-. Vide order dated 28.11.02, the Additional Commissioner, Lucknow confirmed the demand of duty of Rs.5.26,827/- and also directed payment of interest thereon and further imposed penalty of Rs.10,000/-. Being aggrieved, the matter was carried in appeal where the Commissioner(Appeals) set aside the penalty, but confirmed the demand of duty and the interest by its order dt.29.11.08. Hence, the present appeal.

3. Learned Advocate appearing for the appellants submitted that in terms of Notification No.5/2001-CE dated 1.3.2001, the benefit of exemption from the payment of National Calamity Contingent Duty was extended to the excisable goods like tobacco used for smoking through 'hookah' or 'chilam' commonly known as 'hookah' tobacco or 'gudaku' classifiable under sub-heading 2404.99. The said notification was superceded by another Notification No.26/01-CE dated 11.5.2001, and further it was amended by Notification No.11/2002 dated 1.3.2002. By virtue of the said amendment apart from the product classifiable under heading 2404.99, the products classifiable under heading 2404.41 were also granted the same benefit and they included chewing tobacco and preparations containing chewing tobacco other than those having a brand name, which are exempt from whole of the duty of excise vide notification No.8/2001-CE dt.1.3.01 obviously it applied to the product manufactured by the appellants. Drawing our attention to another Notification No.42/2001-CE(N.T) dated 26.6.01, Notification No.22/2003-CE(N.T) dated 24.3.03, Notification No.45/2003-CE(N.T) dated 14.5.03 and Notification No.16/2004-CE(N.T) dated 10.8.2004 and Circular of Central Board of Excise & Customs No.641/32/2002-CX. Dated 26.6.02, learned Advocate submitted that in terms of these later notifications though the benefit of exemption from NCCD was sought to be applied subsequently i.e. under the last notification by way of amendment, the Board in his circular had clearly clarified that it was the intention of the Government to grant such

benefit right from the issuance of the first notification and therefore, same rule should apply in the case of the notification in question. According to the learned Advocate though the product manufactured by the appellants which is classifiable under sub-heading 2404.41 was brought within the benefit of exemption from payment of NCCD under notification dated 1.3.2002, the intention in that regard having been expressed as late as in March,2001 under notification dt.1.3.2001, the benefit should be deemed to have been available to the appellant right from the day, the notification No.5/2001 was issued. The contentions sought to be raised on behalf of the appellants are controverted on behalf of the respondent while contending that notification in question nowhere disclosed its retrospective applicability and therefore, it cannot be applied prior to the issuance of the notification. Undoubtedly as far as the product manufactured by the appellant is concerned, the benefit has been granted from payment of NCC duty under notification No.11/02-CE dated 1.3.02. Merely because such benefit was granted under notification dated 1.3.01 to the product classifiable under sub-heading 2404.99 and that merely because a Board had clarified in relation to some other notifications that the benefit thereunder would apply from the date of issuance of the first notification, that itself would not be a justification to say that the benefit of exemption of the payment of NCCD would also be made available to the appellants retrospectively inspite of the fact that the notification in question nowhere speaks of its retrospective applicability.

4. The Board in other case has issued circular in exercise of its power available under Section 37B of Central Excise Act,1944. The powers are absolutely executive powers and no such powers are available with the Tribunal. The Tribunal cannot in exercise of quasi-judicial powers extend the benefit under notification to the period for which it has not been specifically made applicable. If we accept the contention sought to be raised on behalf of the appellants, it would virtually amount to rewrite the notification so as to grant the benefit thereunder for the period for which the executives have not thought it appropriate and fit for grant of the benefit thereunder.

5. There being no case made out for interference in the impugned order, the appeal is liable to be dismissed. As regards other points sought to be raised in the matter, needless to say that all those points shall remain open to be raised in appropriate proceedings before the appropriate forum and at appropriate stage.

6. In the result, the appeal fails for the reasons stated above and is accordingly dismissed.

(Justice R.M.S.Khandeparkar)
President

(Rakesh Kumar)
Member Technical

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