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

Appeal No. E/603 /2007 – SM[BR]   Date 19/11/2008

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

To :
C.C.E, JAIPUR-II
N.C.R.BUILDING, "C" SCHEME, JAIPUR-302005.

C.C.E, JAIPUR-II   Appellant
Vs
EVERSHINE MARBLES & EXPORTERS PVT. LTD.   Respondent

I am directed to transmit herewith a certified copy of **Final order No.** 1481 / 2008 - **SM[BR]** dated 7.11.2008 passed by the Tribunal under Section 35-C(1)of Central Excises Act, 1944

Assistant Registrar
(SM Appeal Branch)

Copy to :
1. Respondent
EVERSHINE MARBLES & EXPORTERS PVT. LTD.
MAKRANA ROAD, MADANGANJ, KISHANGARH (RAJ.)
2. Adv. / Consult SHRI BIPIN GARG ADV.
B-1/1289-A, VASANT KUNJ NEW DELHI -70

3 S.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 - 3
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
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-1
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Assistant Registrar
(SM Appeal Branch)

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.
Principal Bench, New Delhi

COURT NO. IV

Excise Appeal No. 603 of 2007 (SM)

[Arising out of the Order-in-Appeal No. 687 (HKS) CE/JPR-II/2006 dated 11/12/2006 passed by The Commissioner (Appeals-II), Customs & Central Excise, Jaipur.]

For Approval and signature :
Hon'ble Shri 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?	:

CCE, Jaipur – II — Appellant

Versus

M/s Evershine Marbles & Exporters P. Ltd. — Respondent

Appearance

Shri S.K. Pandey, Authorized Representative (DR) – for the appellant.

Shri Atul Gupta, C.S. – for the Respondent.

CORAM : **Hon'ble Shri Rakesh Kumar, Member (Technical)**

DATE OF HEARING : 07/11/2008.

Final Order No. 1481/08-SM(BR) Dated : 7-11-08

Per. Rakesh Kumar :-

In this case the respondent manufacturing marble slabs from marble blocks, had cleared the marble slabs without payment of duty. A case of Central Excise Duty evasion was booked against them and a show cause notice was issued to them for recovery of Central Excise Duty amounting to Rs. 2,19,396/- alongwith interest and also for imposition of penalty on them under Section 11AC of the Central Excise Act. After issue of the show cause notice the respondent paid the duty of Rs. 2,19,396/- on 10/12/03. The show cause notice was adjudicated by the ~~Assistant~~ Additional Commissioner vide order-in-original dated 29/12/03 by which he confirmed the duty demand of Rs. 2,19,396/- alongwith interest and beside this imposed penalty of Rs. 2,19,396/- on the respondent under Section 11AC. The Commissioner (Appeal), however, vide order-in-appeal dated 26/03/04 following Hon'ble Supreme Court's judgment in case of **Aman Marble Industries Pvt.**

Ltd. vs. CCE, Jaipur reported in **2003 (58) R.L.T. 595 (S.C.)** held that the respondent's activity is not excisable and the marble slabs are not chargeable for excise duty. In view of the Commissioner (Appeal)'s order in their favour, the respondent filed a refund claim on 24/03/06 but the same was rejected the Deputy Commissioner vide order-in-original dated 24/08/06 as time barred, as the same had been filed after expiry of two years from the date of the order passed by the Appellate Authority, which is far beyond the limitation period for filing refund prescribed under Section 11B. The Commissioner (Appeal), however, vide the impugned order dated 08/12/06 allowed the respondent's appeal on the ground that the limitation is not invokable in this case. It is this order of the Commissioner (Appeal) which is under challenge in appeal of the revenue.

2. Shri S.K. Panda, the learned departmental representative pleaded that even if the respondent initially paid the duty under protest , the protest would be treated as having ended once the issue was decided in their favour by the CCE (Appeals) vide the order-in-appeal dated 26/03/04, therefore, the relevant date for ~~committing~~ calculating the limitation period would be

26/03/04 and since the respondent have filed the refund claim long after the expiry of the limitation period prescribed under Section 11B, the same had been rightly rejected as time barred by the Deputy Commissioner. He cited Hon'ble Supreme Court's judgment in case of **Dena Snuff (P) Ltd. vs. CCE, Chandigarh** reported in **2003 (157) E.L.T. 500 (S.C.)**, wherein Hon'ble Supreme Court held that when the duty has been paid under protest, the period of limitation would start from the date of final decision in the Assessee's own case. He pleaded that since the point of dispute in this case was decided in favour of the respondents, by the CCE (Appeals) vide order-in-appeal dated 26/03/04, the limitation would start period has to be pointed from this date and accordingly the revision claim would have been time barred.

3. The learned counsel on behalf of the respondent pleaded that since in this case the duty had been paid under protest, the limitation period would not apply and in this regard he relied upon Hon'ble Supreme Court observation's in para 146 of the judgment in case of **Mafatlal Industries Ltd. vs. Union of India** reported in **1997 (89) E.L.T. 247 (S.C.)**, wherein the Hon'ble Supreme Court observed that, duty paid

in cases, which finally ended in orders or decree or judgments of courts, must be deemed to have been paid under protest and the procedure and limitation etc. stated in Section 11B (2) readwith Section 11B (3) will not apply to such cases. He also pleaded that Clause e (c) in Explanation B to Section 11B, which provided that in the case where duty becomes refundable as the consequence from judgment, decree order or direction from Appellate Authority, the date of such judgment, decree order or direction would be treated as relevant date, was introduced w.e.f. 11/05/07 and since this amendment is prospective, it cannot be applied retrospectively.

5. I have carefully considered the rival submissions. In this case the order-in-appeal in the respondent's favour had been passed on 26/03/04 and it is not under dispute that the refund claim was filed far beyond the limitation period of one year prescribed under Section 11B if calculated from 26/03/04. The point of dispute is as to whether the limitation period prescribed under Section 11B would be applicable in this case or not. The contention of the learned counsel for the respondent is that in such a case, the limitation period will not

apply. I do not agree with this contention. The Hon'ble Supreme Court in para 5 of its judgment in the case of Dena Snuff (P) Ltd. vs. CCE, Chandigarh (Supra) after considering the Hon'ble Supreme Court's judgment in case of Mafatlal Industries Ltd. vs. Union of India (Supra) has held that when the duty has been paid under protest, the period of limitation would be start to run from the date of the final decision in the assessee's own case. In this case, the duty had been paid by the respondent, prior to the issue of the show cause notice but before the adjudication and subsequently the Additional Commissioner's order confirming demand, was challenged before CCE (Appeals). Even if the payment of duty prior to adjudication order passed by the Additional Commissioner is treated as payment under protest, the protest cases to exist once the Additional Commissioner's order was set aside and the issue was decided by the CCE (Appeals) in respondent's favour on 26/03/04. Therefore, in view of the Hon'ble Supreme Court's order in the case of Dena Snuff (P) Ltd. vs. CCE, Chandigarh (Supra), the relevant date for computing the period of one year would be the date of CCE (Appeals)'s order i.e. 26/03/04 and since the refund claim had been filed for beyond the period of one year from this date, the same is time barred. The impugned order is not therefore sustainable and the same is set aside. The Revenue appeal is allowed.

(Dictated and pronounced in open court.)

(Rakesh Kumar)
Member (Technical)

PK