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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/5518/2004 - EX[DB]   Date 17/06/2009

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

To :
M/S AMBEY PROCESSORS
PLOT NO FL-2, SECTOR 13, GIDA GORAKHPUR (U.P.)

M/S AMBEY PROCESSORS   Appellant
Vs
C.C.E. ALLAHABAD   Respondent

I am directed to transmit herewith a certified copy of **Final order No.** 403/2009-EX[DB] dated 10-6-09 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. ALLAHABAD
   38, M.G. MARG, CIVIL LINES, ALLAHABAD
2. Adv. / Consult SH. S.P. OJHA, ADV.,
   299, BAGHAMBARI HOUSING SCHEME
   ALLAHPUR, ALLAHABAD (UP)
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)

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

COURT NO. II

Excise Appeal No. 5518 of 2004-Ex.

(Arising out of Order-in-Appeal No. 613/CE/Alld/2004 dated 20.8.2004 passed by the Commissioner (Appeals), Customs & Central Excise, Allahabad)

M/s Ambey Processors — Appellant

Vs.

CCE, Allahabad — Respondent

Appearance

Appeared for Appellant : Shri S.P. Ojha, Consultant

Appeared for Respondent: Shri K.K. Goel, Jt. CDR

Date of Hearing: 3.6.2009

CORAM: HON'BLE MR. D.N. PANDA, JUDICIAL MEMBER
HON'BLE MR. RAKESH KUMAR, TECHNICAL MEMBER

Final Order No. 403/2009-EX ...dated............

Per D.N. Panda :

Ld. Consultant Shri S.P. Ojha submits that the impugned order was passed due to denial of refund on the ground that the ld. Commissioner, Allahabad by order dated 16.4.94 has confirmed the provisionally determined ACP in terms of order dated 18.12.98. Being aggrieved by that order, the Appellant went to the same Commissioner by a protest letter dated 12.6.99 and that was unheard by that Authority. A copy of that letter is available at page-42 of the appeal folder. The Appellant has brought out its case submitting that it has made deposit of duty under protest and reserved their right to claim refund as well as requested for re-determination of the production capacity excluding length of galleries to save them from suffering. But such prayer is still awaiting decision by the ld. Commissioner, Allahabad. Therefore without disposing the protest letter, the Appellant should not have been denied refund which was categorically claimed in the protest letter itself. Therefore ld. Consultant prays that the appeal may be allowed when the refund claim was held by the ld. Commissioner to be not maintainable, without any basis of law.

2. Ld. Jt. CDR Shri K.K. Goel brings to our notice that when the Appellants failed as early as on 16.4.99, to challenge the final order determining the ACP, before the Tribunal while such order was appealable, it lost its remedy. Therefore it shall not succeed for refund following the decision of Apex Court in the case of **CCE Vs. Flock (India) Pvt. Ltd.** reported in 2000 (120) ELT 285 (SC). To this submission of Revenue, ld. Counsel reacts and submits that when the protest letter of the Appellant was pending to resolve the matter in controversy, that should have been decided by the ld. Commissioner in the light of decision of Apex Court in the case of **CCE Vs. S.P.B.L. Ltd.** reported in 2002 (146) ELT 254 (SC). The Appellant should not have been denied justice by the ld. Commissioner against protest letter. Ld. Jt. CDR further submits that citing a decision without showing that the Appellant was a party before the Apex Court, the Appellant cannot succeed following

the ratio laid down by the Apex Court in the case of **Mafatlal Industries Vs. UOI** reported in 1997 (89) ELT 247 (SC). He submits that no refund shall be admissible to the Appellant when the provisional assessment reached to its finality as early as on 16.4.99 and that remained unchallenged before the Tribunal.

3. Heard both sides in great length.

4. We enquired the manner how a protest letter is dealt by law. We found an answer to this proposition under Rule 233B of Central Excise Rules 1944. According to sub-Rule (5) of the said Rule where remedy of appeal or refund is not available against a protest letter, remedy of detailed representation is available. We appreciate that the litigant cannot be denied to seek remedy through redressal provisions contained in law. When we perused section 11B of Central Excise Act 1944, there also we find that the limitation of six months shall not apply where any duty has been paid under protest. Considering the statutory remedy available to the litigant under Rule 233B, we are of the view that the Appellant should not be made remediless. When the statute grants a forum of redressal on the protest letter dated 12.6.99, that should have been dealt accordingly. That was not done in this case. Therefore the Appellant having exercised its right before above forum, it had a right to be heard against the final assessment of ACP. That cannot be simply brushed aside. No statutory provision was brought to our notice today to deny hearing in respect of final determination of ACP. Therefore following decision of Hon'ble High Court of Delhi in

the case of **International Cargo Services Vs. Union of India** reported in 2006 (193) ELT 546, it would be proper to grant a post decisional hearing to the Appellant in respect of final determination of ACP. This shall provide remedy for disposal of the protest letter dated 12.6.99 of the Appellant.

5. When we find that the Authorities under the statute were not made powerless, the Appellant's grievance deserves to be redressed under Rule 233B itself, since that rule was in force at the material point of time. If the Appellant is heard on both aspects i.e. final determination of ACP as well as its protest letter, the matter in controversy may be resolved.

6. Ld. Jt. CDR's submission that remedy was available against final determination of ACP before Tribunal, such argument can be dealt stating that when the case is taken care by Rule 233B and also following the ratio laid down by Hon'ble High Court of Delhi, we cannot rule that following of principles of natural justice is excluded to do justice. We are of the view that the litigant should not be remediless when the Authority is not powerless to hear protest letter. Also we hold that even if the ACP determination has not provided an opportunity of hearing, the litigant should not be deprived of such hearing, when an order causes prejudice to his interest. We make it clear that in view of peculiar facts and circumstance and existence of protest letter, final determination of ACP shall be expeditiously made following the decision of Apex Court in the case of S.P.B.L Ltd. (supra). We direct that the ld. Commissioner, Allahabad should hear the matter in respect of final

determination of ACP as well as protest of the Appellant in the light law laid down in the case of S.B.P.L. Ltd. and pass a reasoned and speaking order granting fair opportunity to the Appellant.

7. We hope that the aforesaid direction, if followed, the Appellant may not have further grievance to litigate the matter. If the Appellant succeeds before the ld. Commissioner who has to dispose the protest letter cum final determination of ACP, the appellant shall be entitled to consequential benefit if any, in accordance with law. With such conclusion, we set aside the impugned order and direct the Authorities to re-consider the refund consequent upon disposal of the matter by Ld. Commissioner in accordance with law.

(Dictated & pronounced in open Court)

(D.N. PANDA)
JUDICIAL MEMBER

(RAKESH KUMAR)
TECHNICAL MEMBER

RM