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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/387 /2006 - EX[DB] Date 23/06/2009

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

To :
M/S DISTRIET FOOD & SUPPLIES CONTROLLERS
AMBALA, HARYANA

M/S DISTRIET FOOD & SUPPLIES CONTROLLERS Appellant
Vs
C.C.E. CHANDIGARH Respondent

I am directed to transmit herewith a certified copy of **Final order No.** 417/2009- **EX[DB]** dated 28-5-09 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. CHANDIGARH
   C.R. BUILDING, PLOT NO. 19, SECTOR 17-C, CHANDIGARH 160017
2. Adv. / Consult SH. MANJIT SINGH, ADV.,
   4, CENTRAL LANE,
   BENGALI MARKET, N. DELHI-1

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)
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Assistant Registrar
(Excise Appeal Branch)

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

WEST BLOCK NO. 2, R.K. PURAM, NEW DELHI

COURT – III

CENTRAL EXCISE APPEAL NO. 387 OF 2006-EX

[Arising out of Order-in-Appeal No. 863/CE/CHD/2003 dated 2.9.2003 passed by the Commissioner of Central Excise (Appeals), Chandigarh]

For approval and signature:

Hon'ble Mr. M. Veeraiyan, Member (Technical);
Hon'ble Mr. P.K. Das, Member (Judicial)

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 Departmental authorities?	Yes

District Food & Supplies Controller,
Ambala, Haryana — Appellant

Vs.

CCE, Chandigarh — Respondent

Appearance:

Shri Manjit Singh, Advocate for the Appellants;
Shri B S. Suhag, D.R. for the Revenue

Coram:

Hon'ble Mr. M. Veeraiyan, Member (Technical);
Hon'ble Mr. P.K. Das, Member (Judicial)

Date of hearing/decision: 28th May, 2009

Final **ORAL ORDER NO.** 417/2009-Ex **dated** ________

Per M. Veeraiyan:

This is an appeal against the order of the Commissioner (Appeals) No. 863/CE/CHD/2003 dated 2.9.2003.

2. Heard both sides.

3. The relevant facts, in brief, are that the appellant purchased polythene covers from one M/s. Shivalik Agro Poly Plast Products Ltd. in the year 1986. There was dispute about the exciseability of said polythene covers manufactured by M/s. Shivalik Agro Poly Plast Products Ltd. and the same was settled in favour of the assessee. Meanwhile, the duty demanded and penalty imposed were recovered by the department by adjusting from the refund sanctioned to the said Shivalik Agro Poly Plast Products Ltd. On appeal by M/s. Shivalik Agro Poly Plast Products Ltd., the Tribunal granted refund in respect of penalty recovered from them but, declined to order ~~of~~ grant refund of duty recovered from them on the ground that burden of duty stood passed on

to the purchaser i.e. appellant [CCE, Chandigarh vs. Shivalik Agro Poly Products Ltd., reported in 2004 (173) ELT 64 (Tri.-Del.)].

4. The appellant as a purchaser filed refund claim in 1996 which was rejected by the original authority by order dated 30.12.2002. Against the said order the appellant filed appeal before the Commissioner (Appeals) who rejected the appeal with the following findings:-

"I have carefully examined the case records including the Appellants submissions made in writing and at the time of personal hearing and observe that in the instant case goods were purchased in 1986 and the refund claim has been filed on 13.8.96 by the Appellants. Even if the basis of the refund claim is treated to be Order-in-Original No. 153/CE/95 dated 4.8.95, then the claim should have been filed by 03.02.95. Contention of the Appellants that no limitation is attracted because it was a payment under Section 35F does not hold good as duty was recovered from the manufacturer – Supplier against confirmed demand pending recovery against them and not from the Appellants. Further the case law cited as National Binder Vs CCX, Allahabad 2003 (154) ELT 350 (SC) deals with the refund claim where duty was paid under protest, whereas in the instant case duty has been paid by the manufacturer (Seller) and not by the purchaser (Appellants). Since the duty has been paid by the manufacturer and as such it was for manufacturer (SAPL) to claim refund and not the Appellants."

5. Learned Advocate for the appellant submits that the duty was not payable on the polythene covers as decided by the Tribunal. He submits that they made protest to the supplier about paying the duty amount. They were required to make payment of duty amount to their supplier in terms of Arbitration Award dated 15.3.89. The refund claim by Shivalik Agro Poly Products Ltd. had been rejected by the original authority on 3.2.96 and the rejection of refund claim was finally upheld by the Tribunal by order dated 29.7.2004. The payment was made by them to the supplier and the payment by the supplier to the Central Excise department should be treated as under protest. They, as a buyer, borne the burden of duty and claimed the refund in 1996 immediately after the claim by the purchaser was rejected and, therefore, the same should be held to be within the time limit prescribed under Section 11B. Learned Advocate relies upon the decision of the Tribunal in the case of ONGC vs. CCE, reported in 2005 (156) ELT 795 which was upheld by the Hon'ble Supreme Court as reported in 2005 (184) ELT A166.

6. Learned D.R. submits that during the period the appellant purchased the impugned goods, there was no provision in the statute specifically enabling the purchaser of the excisable goods to claim the refund. The said law came into statute books w.e.f. 20.9.1991. The dispute between buyer and the supplier and the manner of resolution of the said dispute between them is not relevant for the present proceedings.

Even if Section 11B is held to be applicable, the claims should have been filed by them within the stipulated period. Therefore, he submits that the order of the Commissioner (Appeals) is legal and correct and the same should be upheld.

7. We have carefully considered the submissions made from both sides. It is not disputed that the purchases have taken place in 1986. The learned D.R. submitted that during the said period there was no specific provision for claim of refund by a purchaser of excisable goods as the said provision was introduced only w.e.f. 20.9.1991. Learned Advocate submits that the claim prior to 20.9.91 also could be made by any person and the amendment in 2001 related only to the relevant date for filing refund claim by the purchaser. We have not been shown any evidence that M/s. Shivalik Agro Poly Products Ltd. have paid the duty under protest. Mere recovery by way of adjusting a confirmed demand from refund due to the party cannot be treated as payment under protest by the party. In any event, whether payment was made under protest by Shivalik Agro Poly Products Ltd. was relevant in relation to the dispute between them and the Central Excise department which has already been settled in the two rounds of litigation. The appellant has entered the fray only in 1996 and it cannot be said that they have made the payment under protest. The protest, if any, made to the supplier can not be treated as protest to the Department. Further, when payment has been settled

between the buyer and the seller, the question of protest also does not arise. Before the amendment in 1991, the claim should be made within 6 months from the date of payment of duty and after the amendment, the claim by any buyer has to be made within six months from the date of purchase. In other words, prior to the amendment, the buyer had lesser time to claim the refund. In either case, the appellant has not claimed the refund within the time limit prescribed. Under these circumstances, the order of the Commissioner (Appeals) rejecting the refund claim appears to be legal and reasonable.

8. In view of the above, appeal is rejected.

(M. VEERAIYAN)
MEMBER (TECHNICAL)

(P.K. DAS)
MEMBER (JUDICIAL)

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