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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/1104/2009 – SM[BR] E / STAY / 1082 / 2009 –SM[BR] Date 17/09/2009

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

To :
M/S PEPSICO INDIA HOLDINGS PVT. LTD.
A-36, SIDA, SATHARIYA, JAUNPUR (U.P.)

M/S PEPSICO INDIA HOLDINGS PVT. LTD. Appellant
Vs
C.C.E ALLAHABAD Respondent

I am directed to transmit herewith a certified copy of **Final order No**. 1139 /2009 –SM[BR]& S/ 524/2009 dated 15.7.2009 passed by the Tribunal under Section 35-C(1)of Central Excises Act, 1944

Assistant Registrar
(SM Appeal Branch)

Copy to :
1. Respondent
   C.C.E ALLAHABAD
   38,M.G.MARG, CIVIL LINES, ALLAHABAD
2. Adv. / Consult SHRI RAVI RAGHAVAN ADV.
   N/V;-------------------------------

3 S.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 Kuni. New Delhi - 110070
13 Taxmann Allied Service Pvt Ltd.. 21/35. West Puniabi 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
(SM Appeal Branch)

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI, PRINCIPAL BENCH NEW DELHI

Excise Stay Application No.1082 of 2009-SM (BR) in
Appeal No.E/1104 of 2009-SM (BR)

[Arising out of common Order-in-Original No.127/128/CE/ALLD/2008 dated 29.12.2008 passed by the Commissioner of Central Excise (Appeals), Allahabad]

Date of Hearing/ Decision:15.07.09

For approval and signature:

Hon'ble Mr. P.K. Das, Member (Judicial)

1. Whether Press Reporters may be allowed to see CESTAT (Procedure) Rules, 1982.		No
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?	:	Yes

M/s. Pepsico India Holdings (P) Ltd. ...Appellants
[Rep. by Shri Ravi Ragahavan, Advocate]

Vs.

CCE, Allahabad ...Respondent
[Rep. by Shri S.N. Srivastava, SDR]

CORAM: **Hon'ble Mr. P.K. Das, Member (Judicial)**

Final Order No.1139/2009-SM(BR) & S/524/09-SM(BR)/Dated:15.07.2009

Per P.K. Das:

As the issue involved in this case is in narrow compass, therefore, after granting stay, the appeal itself can be taken up for disposal.

2 Ld. Advocate submits that the Original Authority confirmed the demand of duty of Rs.4,50,523/- and imposed penalty of Rs.4,89,334/- under Section 11 AC of the Central Excise Act, 1944 read with Rule 13 of the Cenvat Credit Rules, 2002. The appellant filed appeal before the Commissioner (Appeals) against the adjudication order. Revenue also filed appeal against the adjudication order for imposition of separate penalty under Rule 13 (2) of the Cenvat Credit Rules, 2002. The appellant also filed cross objection against Revenue's appeal under Section 35 E(4) of the Central Excise Act, 1944. Commissioner (Appeals) rejected the appeal filed by the appellant on the ground of time bar. Further, the appeal filed by the Revenue was allowed by the Commissioner (Appeals). The cross objections filed by the appellant was not entertained by the Commissioner (Appeals) as the appeal filed by the appellant was dismissed as time barred.

3 The main contention of the ld. Advocate is that the appeal filed by the Revenue before the Commissioner (Appeals) was under Section 35 E (4) of the Central Excise Act, 1944. It is his submission that Section 35 E (4) provides that the appeal filed by the Revenue under Section 35 E (2) read with sub-section 4 of the said section, the provisions of this Act regarding appeals including the provisions of sub-section 4 of Section 35 B(4) shall sofar as may be applied to such application. Section 35 E(4) provides as under:-

> "35E(4) Where in pursuance of an order under sub-section (1) or sub-section (2), the adjudicating authority or

the authorized officer makes an application to the Appellate Tribunal or the Collector (Appeals) within a period of three months from the date of communication of the order under sub-section (1) or sub-section (2) to the adjudicating authority, such application shall be heard by the Appellate Tribunal or the Collector (Appeals), as the case may be, as if such application were an appeal made against the decision or order of the adjudicating authority and the provisions of this Act regarding appeals, including the provisions of sub-section (4) of Section 35 B shall, so far as may be, apply to such application."

4. The submission of the ld. Advocate is that the cross objections filed by the appellants under Section 35 B(4) read with Section 35 E(4) should be treated as cross appeals against the adjudication order.

5. On the other hand, ld. DR reiterates the findings of the Commissioner (Appeals). He submits that the appeal filed by the appellant has already been dismissed as time barred and, therefore, the cross appeal cannot be maintained.

6. I am unable to accept the submission of the ld. DR. On perusal of Section 35 E(4) read with Section 35 B(4), there is provisions for filing memorandum of cross objections within 45 days of the receipt of the notice. Ld. Advocate submits that they have filed cross objection within the stipulated period.

7. On perusal of the impugned order, the Commissioner (Appeals) rejected the cross objections filed by the appellants because the appeal filed by the appellant was not within the stipulated period. Therefore, the

order-in-original deemed to have been accepted by them. Therefore, their plea that the said order itself deserves to be set aside is not rightly admissible.

8. I do not find any deemed provisions under Section 35 B or Section 35 E. It appears that the Commissioner (Appeals) failed to consider the provisions of Section 35 E read with Section 35 B (4) of the Act. Hence, the impugned order is set aside. The matter is remanded back to the Commissioner (Appeals)to decide after considering the above observations in accordance with law. Needless to say that the Commissioner (Appeals) shall decide the matter after granting opportunity of hearing. The appeal is allowed by way of remand. The stay application is disposed of.

Order dictated & pronounced in open court on 15.07.2009.

(P.K. Das)
Member (Judicial)

ckp.