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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

Date 14/12/2009

Appeal No. E/3774/2006 – SM[BR]

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

To :
C.C.E. KANPUR
117/7, SARVODAYA NAGAR, KANPUR. Appellant

C.C.E. KANPUR Vs
Respondent

M/S.KOTHARI PRODUCTS LTD

I am directed to transmit herewith a certified copy of **Final order No. 1521 / 2009 –SM[BR]** dated 20.11.2009 passed by the Tribunal under Section 35-C(1)of Central Excises Act, 1944

Assistant Registrar
(SM Appeal Branch)

Copy to :

1. Respondent
   M/S KOTHARI PRODUCTS LTD
   6&7 INDUSTRIAL ESTATE, FAZALGANJ, KALPI ROAD, KANPUR.
2. Adv. / Consult
   MR.K.K ANAND
   A-5,BASEMENT,LAJPAT NAGAR-III NEW DELHI-24
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 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
(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. 3774 of 2006 (SM)

[Arising out of the Order-in-Appeal No. 417-CE/APPL./KNP/2006 dated 31/08/2006 passed by The Commissioner (Appeals), Customs & Central Excise, Kanpur.]

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, Kanpur Appellant

Versus

M/s Kothari Products Ltd. Respondent

Appearance

Shri S.N. Srivastava, Authorized Representative (DR) – for the appellant.

Shri Hemant Bajaj, Advocate – for the Respondent.

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

DATE OF HEARING : 20/11/2009.

final Order No. 1521/2009 SM(BR) Dated : ____________

Per. Rakesh Kumar :-

This is Revenue's appeal against order-in-appeal No. 417-CE/APPL./KNP/ 2006 dated 31/08/2006 passed by CCE (Appeals), Kanpur. The facts leading to this appeal are, in brief, as under :-

1.1 The respondent on 11/12/2001 filed a refund claim of Rs. 1,05,73,237/-. On 3/6/94, the Assistant Jurisdictional Assistant Commissioner passed the refund order sanctioning the refund claim and the cheque for refund amount was issued on 13/7/04. Though the refund sanctioned was Rs. 1,05,73,237/-, the amount paid to the respondent was Rs. 18,38,918/- as out of the refund of Rs. 1,05,73,237/-, the confirmed demands (duty, interest and penalty) of Rs. 2,26,095/-, Rs. 43,07,393/- and Rs. 42,00,801/- were adjusted. Thus total amount of Rs. 87,34,289/- was deducted. However, at that time, the respondent's appeals against the orders confirming the duty, interest and penalty of Rs. 2,26,095/-, Rs. 43,07,393/- and Rs. 42,00,801/- were pending before Commissioner (Appeals) and subsequently the Commissioner (Appeals) vide order-in-appeal No. 293/CE/ Appl/KNP/2003 dated 31/12/2003, 277/CE/Appl/KNP/2004 dated 24/05/2004 and No. 549/CE/Appl/KNP/2004 dated 01/10/2004 allowed these appeals, as a result of which these amounts were no longer recoverable and as such became refundable. The amounts of Rs. 2,26,095/- and Rs. 43,07,393/- were paid back to the respondent on 8/10/04 and amount of Rs. 42,00,801/- was paid back to the respondent on 19/7/05. The respondent, thereafter, requested for interest on the refund amount of Rs. 87,34,289/- [Rs. 2,26,095/- + Rs. 43,07,393/- + Rs. 42,00,801/-] which should have been paid on 13/7/04 but were paid on 8/10/04 and 19/7/05. The respondent's claim for interest on this amount for the period of delay from 14/7/04 onward was rejected by the Assistant Commissioner vide order-in-original dated 20th March 2006. However, on appeal against the Assistant Commissioner's order, the CCE (Appeals), Kanpur vide impugned order-in-appeal dated 31/8/06 allowed the appeal permitting interest for the period from 14/7/04 till the date of payment. It is against this order that the present appeal has been filed by the respondent.

2. Heard both the sides.

2.1 Shri S.N. Srivastava, the learned Departmental Representative reiterated the grounds of appeal in the revenue's appeal which are reproduced below :-

> "In this case, after a particular amount was ordered to be refunded, a portion of the same was adjusted against an amount of penalty and interest confirmed against the assessee by another order. Later on, the order imposing such interest and penalty was vacated. As a result, the amount adjusted from the assessee's refund claim earlier, as afore-stated, became refundable. While refunding this amount, the department refused to pay interest on the same, on the ground that the amount that was appropriated against the party's refund claim also represented penalty and interest on which no interest is payable as per Section 11-BB of Central Excise Act, 1944 and also in the light of Section 11-B of Central Excise Act, 1944.
>
> The Commissioner (Appeals) has wrongly held in the subject Order-in-Appeal that interest has to be paid on such amount because once the order imposing

penalty and interest was vacated, the amount adjusted became duty only. Therefore, the Commissioner (Appeals)'s view is not acceptable because the amount that was appropriated against the party's refund claim represented penalty and interest. Since, as a result of such appropriation, the party effectively paid penalty and interest, and not duty, not interest on refund of such penalty and interest will be payable."

2.1.1 The learned Departmental representative also relied upon on the judgment of the Tribunal – order No. 905/09 (SM) dated 29/7/09 in the case of CCE, Kanpur vs. M/s Kothari Products.

3. Shri Hemant Bajaj, Advocate, the learned Counsel for the respondent pleaded that the refund claim had been filed on 11/12/2001 and as per the provisions of Section 11BB the interest would become payable from the date immediately after the date of expiry of three months from the date of filing of this claim and on this basis, the interest on the refund claim would be admissible to the respondent w.e.f. 10th March 2002, but still the Commissioner (Appeals) has allowed the interest for the period from 14/07/04 to 19/07/05, while in any case, would be admissible. Hon'ble Rajasthan High Court in the

case of **J.K. Cement Works vs. Asstt. Commissioner of Central Excise & Customs** reported in **2004 (170) E.L.T. 4 (Raj.)**, para 21 of the judgment has held that :-

> "Consequence of not paying refund within three months of making such application under Section 11B is that the Revenue becomes liable to pay interest on amount of refund with effect from the expiry of three months from the date of application until date of actual payment. The liability to pay interest is not tagged with decision to pay interest but in case it is ultimately found to be payable liability is with effect from expiry of three months of the date of receipt of application required to be made under Section 11B (1)."

Shri Bajaj pleaded that the entire amount of refund sanctioned by the Assistant Commissioner should have been paid to the respondent on 13/7/04 and if at that time the Department chose to adjust a major portion of the refund claim against some demands, which subsequently were set aside, at the time of payment of the balance amount the respondent becomes eligible for interest.

4. I have carefully considered the submissions from both the sides and perused the records.

4.1 First thing which I find, is that while the revenue has filed the appeal against the Commissioner (Appeals)'s order on 30th November 2006, there is no authorization by the Commission of Commissioner for filing appeal to Tribunal against the Commissioner (Appeals)'s order and there is no explanation in this regard from the learned DR. Therefore, on this very ground this appeal is liable to be dismissed. Even on merits also, I find that when the refund claim was sanctioned on 3/6/04 it was not correct to issue the cheque for only Rs. 18,38,918/- after deducting an amount of Rs. 87,34,289/- against some demands were still pending before Commissioner (Appeals). Just because while payment of refund, in addition to confirmed duty demands, some penalty and interest were also adjusted which were subsequently set aside, the amount adjusted towards penalty and interest would not become penalty and interest and on setting aside of the order of penalty and interest, the interest on the refund, which was payable to the respondent cannot be denied. In any case, since the Commissioner (Appeals) has allowed the interest from 14/7/04, I do not find any infirmity in the Commissioner

(Appeals)'s order. The Revenue's appeal is, therefore, dismissed.

(Dictated and pronounced in open court)

(Rakesh Kumar)
Member (Technical)

PK