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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

Date 15/02/2010

Appeal No. E/648 /2005 - EX[DB]

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

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

Appellant
Vs
Respondent

C.C.E.KANPUR

M/S KOTHARI PRODUCTS LTD.

I am directed to transmit herewith a certified copy of **Final order No. 53/ 2010 EX[DB]** dated 03-12-09 passed by the Tribunal under Section 35-C(1)of Central Excises Act, 1944

Assistant Registrar
(Excise Appeal Branch)

Copy to :
1. Respondent
M/S KOTHARI PRODUCTS LTD.
133/233-235,TRANSPORT NAGAR KANPUR
2. Adv. / Consult SH. K.K. ANAND, ADV.,
A-5, BASEMENT,
LAJPAT NAGAR-III
N. DELHI-24
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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17 Guard file
18. HON'BLE PRESIDENT

Assistant Registrar
(Excise Appeal Branch)

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
WEST BLOCK NO.II, R.K. PURAM, NEW DELHI-110066.
BENCH-DB

COURT - I

Excise Appeal No. E/648/05-Ex

[Arising out of Order-in-Appeal No.549-CE/APPL/Knp./2004 deated 01.10.2004 passed by the Commissioenr (Appeals) Central Excise, Kanpur].

Date of Hearing/Decision:3.12.2009

For approval and signature:

Hon'ble Mr. Justice R.M.S. Khandeparkar, President
Hon'ble Mr.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?	Yes
2	Whether it should 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

CCE, Kanpur ...Appellant

Vs.

M/s.Kothari Products Ltd. ... Respondent

Present for the Appellant : Shri Sunil Kumar, DR
Present for the Respondent : Shri K.K. Anand, Advocate

Coram: Hon'ble Mr.Justice R.M.S. Khandeparkar, President
Hon'ble Mr. Rakesh Kumar, Member (Technical)

FINAL **ORAL ORDER NO.** 53/2010-EX **DATED:3.12.2009**

PER: JUSTICE R.M.S.KHANDEPARKAR

Heard Shri.Sunil Kumar ld. DR for the appellant and Shri.K.K.Anand, ld. Advocate for the respondent. The appellant challenges the order dated 1st October, 2004 passed by the Commissioner (Appeals), Kanpur whereby the Lower Appellate Authority has allowed the appeal filed by the respondent in relation to the interest amount of Rs.42,00,801.35, which was sought to be deducted by the

Original Authority while allowing the refund application. The Asst. Commissioner, Kanpur by its order dated 4th June, 2004, while allowing the refund of Rs.1,05,73,237/-, had appropriated sum of Rs.42,00,801.35 in terms of proviso to section 11AA of the Central Excise Act 1944 on account of Central Excise Duty confirmed by Order-in-Original No.3/COLLR/DEM/93 dated 22.03.93 and which was upheld by the Hon'ble Supreme Court.

2. Facts, in brief, are that the duty liability on account of clearance of pan masala Gutkha manufactured by the respondents was assessed and confirmed by the Adjudicating Authority under its order dated 22nd March, 1993. Being aggrieved, the respondent carried the matter in appeal before this Tribunal, which was allowed under order dated 5th September, 1994 and duty liability of the respondent was quashed. The Department carried the matter in appeal before the Apex Court, wherein the appeal was allowed and order dated 22nd March, 1993 of the Original Authority was confirmed by the Apex Court by its order dated 28th November, 2002. Meanwhile the respondent having realized excess payment of duty for the period between 10th October, 2000 to 31st October, 2000, filed their refund claim application dated 13th December, 2001. A show-cause-notice in that regard came to be issued on 28th of December, 2001 requiring the respondents to show cause as to why the refund claim should not be rejected. After hearing the parties, the Dy. Commissioner did not find any reason to reject the claim on the ground of unjust enrichment. However, he rejected the claim on the ground of

bar of limitation under section11B of the said Act under its order dated 28th Feb., 2002. Being aggrieved, the matter was carried in appeal before the Commissioner (Appeals), who allowed the same under order dated 17th March, 2004 with consequential relief. Consequent to the said order, the respondent requested for refund of the amount claimed under the letter dated 14th April, 2004. Thereafter, the Department informed the respondents that while disposing the claim of the respondent under order dated 28th Feb., 2002, the authorities had not decided the matter on merits and, therefore, the refund claim was required to be scrutinized and was accordingly, scrutinized and after hearing parties, the claim for Rs.1,05,73,237/- was allowed. However, at the same time considering the fact that the respondent had not paid the duty, which was liable to be paid in terms of the order of the Original Authority dated 22nd March, 1993, confirmed by the Apex Court in its order dated 28th November, 2002, certain amount there-from was appropriated including the amount of Rs.42,00,801.35 being the interest amount payable on the delayed payment of duty. The order in this regard was passed by the Asstt. Commissioner dated 3rd June, 2004. Being aggrieved, the mater was carried in appeal before the Commissioner (Appeals) by the respondent, which came to be allowed under the impugned order.

3. Drawing our attention to section 11AA of the said Act, the ld. DR submitted that the order of the Original Authority having been confirmed by the Apex Court by its order dated 28th November 2002, the duty liability related to the date of

the determination of the duty by the competent authority, that is, by the Original Authority and hence, merely because during the relevant period there was no order in favour of the Revenue on account of the order passed by the Tribunal that would not enable the assessee to avoid the obligation to pay interest on delayed payment of duty. Attention was drawn to the proviso to section 11AA. He further submitted that explanation 2 to section 11AA further makes it clear that the relevant date would be date of determination of the duty by the Original Authority confirmed by the appellate or higher authorities. In the case in hand, the matter being finally disposed by the order of the Supreme Court confirming the order of determination by the Original Authority, the interest liability will commence from the date of determination of duty liability by the original adjudicating authority.

4. On the other hand, the ld. Advocate appearing for the respondents submitted that the order of the Original Authority merged into the order of the Tribunal. During the relevant period, there was no order in favour of the Revenue on account of the order passed by the Tribunal setting aside the claim by the Revenue in relation to the interest amount. He further submitted that explanation 2 to section 11AA rather than lending any support to any contention canvassed by the appellants states that unless there is determination as such, there can be no liability to pay the interest. In this case determination having been done after the Apex Court decision dated 28th November, 2002, question of payment of interest prior to that cannot arise. It is also sought to be contended

that there was no demand for interest and, therefore, there was no obligation to pay interest.

5. It is settled law that an appeal is a continuation of the original proceedings. As rightly submitted by the ld. Advocate for the respondents, the order of the Commissioner, that is, the Original authority had merged in the order passed by the Tribunal. Equally so is the case in relation to the order of the Tribunal as the matter was carried in appeal before the Apex Court and the Apex Court had passed its order on merits on 28th Nov., 2002 and consequently, the order of the Tribunal had merged in the order passed by the Apex Court. Being so, in the entire proceedings, the order which can be said to be an executable order is only the order of the Supreme Court. Once it is clear that the order of the Supreme Court confirmed the order passed by the Original authority fixing the liability in relation to the duty, it cannot be contended that whatever consequence flow from such order can be avoided by the assessee. The effect of the order of the Supreme Court dated 28th November, 2002 would be that the duty liability stood determined w.e.f. 22nd March, 1993 the day on which the same was determined by the original adjudicating authority. Consequently, all the rights and obligations which arise and which would flow from such order will have effect from 22nd March, 1993. Bearing this in mind, the finding arrived at by the Commissioner (Appeals) that during the interim period the demand of duty was set aside and the demand of duty come into existence only after the order of the Supreme Court cannot be sustained. Once the principle about the merger of

the order of the lower authority with that of the higher authority is well settled, and the final order passed by the highest authority becomes the executable in terms of the order of the original authority as the Supreme Court by order dated 28th Nov., 2002 has confirmed the order of the Original Authority dated 22nd March, 1993.

6. Section 11AA of the said Act deals with the subject of interest on delayed payment of duty. Sub-section (1) thereof provides that subject to the provisions contained in section 11AB where a person chargeable with duty determined under sub-section (2) of Section 11A fails to pay such duty within three months from the date of such determination, he shall be liable to pay in addition to the duty, interest at such rate not below 10% and not exceeding thirty-six per cent per annum, as is for the time being fixed by the Central Government by Notification in the Official Gazette on such duty from the date immediately after the expiry of the said period of three months till the date of payment of such duty. The proviso thereto provides that where a person chargeable with duty determined under sub-section (2) of section 11A before the date on which the Finance Bill 1995 receives the assent of the President fails to pay such duty within 3 months from such date, then such person shall be liable to pay interest under this section from the date immediately after three months from such date, till the date of payment of such duty.

7. Plain reading of these provisions would disclose that the liability to pay interest arises on expiry of the period of 3

months from the date of determination of duty liability. In the case in hand, the duty liability was fixed initially on 22nd March, 1993 and this was confirmed by the Apex Court on 28th November, 2002. Obviously, the determination of duty, therefore, would be with effect from 22nd March, 1993. The Proviso further clarifies that in case where the duty is not paid till the expiry of three months from the date of the assent of the President to Finance Bill 1995, the person who fails to pay such duty would be liable to pay interest from the date immediately after three months from such date till the date of payment in accordance with the said section. As rightly pointed out by the ld. AR, the provision clearly discloses that in the facts and circumstances of the case, the liability to pay interest by the assessee cannot be disputed. Explanation 2 to section 11AA provides that where the duty determined to be payable is increased or further increased by the Commissioner (Appeals), Appellate Tribunal, National Tax Tribunal or, as the case may be, the Court, the date of such determination shall be, (a) for the amount of duty first determined to be payable, the date on which the duty so determined, (b) for the amount of increased duty, the date of order by which the increased amount of duty is first determined to be payable, and (c) for the amount of further increase of duty, the date of order on which the duty is so further increased. The explanation merely clarifies that in case of variation of the duty amount, the interest would be calculated on the varied amount from the date of variation in the amount of duty.

8. As regards the contention that no demand of interest was made by the Department, it is to be noted that neither such contention was ever raised before the Lower Authority nor there is any cross-appeal or counter file to the present appeal, nor the Lower Appellate Authority has decided the matter on that ground. It is not permissible for the parties to raise new point at this stage. Even otherwise, the interest liability flows from the statutory provision itself.

9. The perusal of the impugned order discloses that adjustment of interest on the amount to the tune of Rs.42,00,801.35 has been set aside solely on the ground that the Supreme Court's Order was passed on 28th November 2002 and prior to that there was no order in favour of the Revenue. For the reasons stated above, this could not be a ground for setting aside the order passed by the Original Authority.

10. In the result, therefore, the appeal succeeds and the impugned order is set aside and order passed by the Original Authority is restored with the consequential relief.

(JUSTICE R.M.S.KHANDEPARKAR)
PRESIDENT

(RAKESH KUMAR)
MEMBER (TECHNICAL)

Anita