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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. ST/260 /2009 – SM[BR] Date 18/01/2010

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

To :
M/S AVERY INDIA LIMITED,
PLOT NOS. 50-59,SECTOR-25, BALLABGARH
(HARYANA)

M/S AVERY INDIA LIMITED, Appellant
Vs
C.S.T. DELHI Respondent

I am directed to transmit herewith a certified copy of **Final order No.** 87 / 2010 –SM[BR] dated 13.1.2010 passed by the Tribunal under Section 129, (B) of the Customs Act,1962 & Financial Act 1994 relating to Service Tax

Assistant Registrar
(SM Appeal Branch)

**Copy to :**

1. Respondent
   C.S.T. DELHI
   17-B, I.P. ESTATE, IAEA HOUSE, NEW DELHI.
2. Adv. / Consult
   MR.J.K.MITTAL &CO
   A-15,THIRD FLOOR,PRIYADARSHINI VIHAR DELHI-110092
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 AND SERVICE TAX APPELLATE TRIBUNAL,
NEW DELHI, PRINCIPAL BENCH NEW DELHI

Appeal No.ST/260 of 2009-SM Branch

[Arising out of Order-in-Original No.78/VKG/2008 dated 7.10.2008 of the Commissioner of Service Tax, Delhi]

**Date of Hearing/ Decision:13.01.2010**

For approval and signature:

**Mr. M. Veeraiyan, Member (Technical)**

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1. Whether Press Reporters may be allowed to see CESTAT (Procedure) Rules, 1982.
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? :

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M/s. Avery India Ltd. ...Appellants
(Rep. by Shri J.K. Mittal, Advocate )

Vs.

CST, Delhi ...Respondent
(Rep. by Shri N.K. Saxena, Jt.CDR)

CORAM: **Hon'ble Mr. M. Veeraiyan, Member (Technical)**

Final Order No..87../2010 SM (Br)........../Dated:13.01.2010

***Per M. Veeraiyan:***

This is an appeal against the Order-in-Review dated 7.10.2008 passed by the Commissioner of Service Tax under Section 84 of the Finance Act, 1994.

2. Heard both sides.

3. By an Order dated 10.10.2006, Original Authority sanctioned refund claim of Rs.5,32,521/- and credited the same to the Consumer Welfare Fund. Against the said order of the Original Authority, the party filed an appeal before the Commissioner (Appeals), who vide Order dated 10.04.2008 set aside the order of the Original Authority holding that the Original Authority erred in crediting the amount to the Consumer Welfare Fund and the appellants were entitled for refund. After the said order has been passed by the Commissioner (Appeals), the Commissioner issued a show cause notice dated 17.09.2008 proposing to review the order of the Original Authority dated 10.10.06 and subsequently, passed the impugned order dated 7.10.08 by which he rejected the refund of Rs.5,32,521/-.

4. Shri J.K. Mittal, ld. Advocate submits that well before issue of the show cause notice dated 17.09.08 for review under Section 84 of the Finance Act, the order of the Original Authority have got merged with the order of the Commissioner (Appeals) dated 10.04.08. Therefore, the show cause notice dated 17.09.08 and subsequent order dated 7.10.08 ordering review of the order of the Original Authority are exercise against the order, which is not existing. He also submits that before show cause notice was issued for review, the Department

has already filed appeal before the Tribunal challenging the order dated 10.04.2008 of the Commissioner (Appeals). Therefore, he submits that the order of the Commissioner ~~(Appeals)~~ 7.10.08 should be held non-est. Ld. Advocate also fairly submits that the appellants have not filed a reply to the show cause notice dated 17.09.08 and did not appear for personal hearing and, therefore, the issuance of the order dated 10.04.2008 was not specifically brought to the notice of the Commissioner.

5. Shri N.K. Saxena, Jt.CDR fairly accepts the facts involved but reiterated the findings of the Commissioner (Appeals).

6. I have carefully considered the submissions from both sides and perused the records. It is seen that revision powers of the Commissioner of Central Excise under Section 84 are restricted in certain situations. As per Section 84 (4), "no order under this section shall be passed by the Commissioner of Central Excise in respect of any issue if an appeal against such issue is pending before the Commissioner of Central Excise (Appeals)." Since the matter not only went before the Commissioner (Appeals) before initiation of review proceedings, but the Commissioner (Appeals) has undisputedly decided the matter in favour of the party vide his Order dated 10.04.08 and undisputedly, the Department has also field an appeal against the said order of the Commissioner (Appeals) before the Tribunal.

7. In view of the above, I find force in the submissions of the ld. Advocate and accordingly, hold that the order dated 7.10.08 of the Commissioner cannot be allowed to be survive and the same is set aside.

8. The appeal is disposed of.

Order dictated & pronounced in open court on 13.1.2010.

( M. Veeraiyan )
Member (Technical)

Ckp.