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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/1683/2009,2044/2009 - EX[DB] Date 31/03/2010
E/S/1752 & 2109/09-EX

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

To :
M/S SWIFT FINVEST PVT LTD
VILLAGE KALAHERA PANIYALA MOD KOTPUTALI
DISTT- JAIPUR
M/S SWIFT FINVEST PVT LTD — Appellant
Vs
C.C.E. JAIPUR I — Respondent

STAY ORDER NO.169-170/2010-EX

I am directed to transmit herewith a certified copy of **Final order No. 113-114/ 2010 EX[DB]** dated 01-2-2010 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. JAIPUR I
   N.C.R.BUILDING, STATUE CIRCLE, "C" SCHEME, JAIPUR 302005.
2. Adv. / Consult SH. BIPIN GARG, ADV, B-1/1289-A, VASANT KUNJ, N. DELHI-70
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
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16 Office Copy
17 Guard file
18. HON'BLE PRESIDENT

Assistant Registrar
(Excise Appeal Branch)

19. SHRI BRAHM DUTT MODI, DIRECTOR OF
M/S SWIFT FINVEST PVT. LTD., VILLAGE- KALAHERA
PANIYALA MODE, TEHSIL-KOTPUTLI, JAIPUR (RAJ.)

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No.2, R.K.Puram, New Delhi-110066.
Principal Bench, New Delhi.

E/S/1752/09 in E/1683/09 and
E/S/2109/09 in E/2044/09

M/s. Swift Finvest P.Ltd.
Shri Brahm Dutt Modi, Director — Appellants

Versus

CCE, Jaipur — Respondent

Appearance
Sh. Bipin Garg, Adv. For Appellants

Sh. Anil Khanna, DR for Respondent

Coram: Hon'ble Mr. JUSTICE R.M.S.KHANDEPARKAR, PRESIDENT
Hon'ble Mr. RAKESH KUMAR, MEMBER (TECHNICAL)

Date of hearing : 1.2.2010
STAY Order No 169-170/10-EX

Per Justice R.M.S.Khandeparkar:

Heard the matter at length. Both applications are disposed of while allowing the same and directing the Registry to place the appeals(No.E/1683/09 & E/2044/09) for final disposal forthwith. Applications accordingly stand disposed of.

(Justice R.M.S. Khandeparkar)
President

(Rakesh Kumar)
Member(Technical)

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IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No.2, R.K.Puram, New Delhi-110066.
Principal Bench, New Delhi.

Excise Appeal No.1683/09 & E/2044/09

[Arising out of Order-in-Appeal No.13-14/2009(CE) dt.13.3.2009 passed by the Commissioner of Central Excise, Jaipur)

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 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 Department Authorities: : Yes

M/s. Swift Finvest Pvt. Ltd.
Sh. Brahm Dutt Modi, Director — Appellants

Versus

CCE, Jaipur-I — Respondent

Appearance

Sh. Bipin Garg, Adv. for Appellants

Sh. Anil Khanna, Authorised Departmental Representative(DR) For Respondent

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

Date of decision: 1.2.2010
FINAL Oral Order No. 113-114/10-Ex

Per Justice RMS Khandeparkar:

Heard at length learned Advocate for the appellants and learned DR for the respondent. Since common questions of law and facts arise in both these appeals, they were heard together and are being disposed of by this common order.

2. The appeals arise from the order dated 13.3.2009 passed by the Commissioner of Central Excise, Jaipur. By the impugned order, the duty demand to the tune of Rs.71,85,555/- has been confirmed against the appellants while directing payment of interest thereon and has also imposed penalty of equal amount. Further penalty of Rs.10 lakhs (Rs. ten lakhs) has been imposed on the Director Shri Brahm Dutt Modi.

3. The appellants' company is engaged in manufacture of Ordinary Portland Cement falling under sub-heading 25231910 of the first schedule of the Central Excise Tariff Act,1985 from clinker which is either manufactured in its own factory or procured from outside. In the course of the audit of the records maintained by the appellants carried out in the month of October'07, it was observed that the appellants had been manufacturing Ordinary Portland Cement and had been paying concessional rate of duty by availing the benefit of Notification No.4/2006-CE dt.1.3.06. In order to avail the benefit of concessional rate of duty, the appellants were required to fulfill the conditions laid down under the said notification and in

particular S.No.1(i) thereof. The said condition required the manufacturer to make a declaration to the Dy. Commissioner of Central Excise or the Assistant Commissioner of Central Excise having jurisdiction regarding installed capacity of the factory before availing of exemption under the said notification and to furnish such information or documents, if any, as may be required by the Excise Officer for his satisfaction in that regard. As no such declaration was produced before the audit and as it was disclosed by the appellants that no such declaration was filed, a show cause notice dated 9.1.08 came to be issued requiring the appellants to show cause as to why the duty to the tune of Rs.58,77,470/- should not be recovered besides other dues including interest and penalty.

4. Thereafter the Excise Department Officers of Anti Evasion visited the appellant's factory premises and summoned the appellant Director for recording of his statement and production of the documents. Accordingly, the appellant Director appeared before the Excise Officers on 7.2.2008 and produced the documents including copy of the agreement dated 1.6.07 and 15.2.06 in relation to assignment of right by Kamdhenu Ispat Ltd. and Kamdhenu Cement Ltd. to use their brand name 'Kamdhenu' for the product manufactured by the appellants as well as some other documents. Pursuant thereto another show cause notice dated 15.5.2008 came to be issued requiring the appellants to show cause as to why the short paid duty amounting to Rs.71,85,555/- should not be recovered alongwith interest as also

why the penalty should not been imposed for suppressing the fact of use of brand name of another person for the product manufactured and cleared by the appellants during the period from July,2006 to January,2008. The earlier show cause notice referred to the period from July,2006 to September,2007. The first show cause notice was replied by the appellants on 6.5.2008 and the second show cause notice was replied under letter dated 18.2.09. After hearing the parties, the Commissioner confirmed the demand as stated above. Hence the present appeal.

5. The impugned order is sought to be challenged on three grounds. Firstly the records do not justify invokation to the extended period of limitation and therefore, the claim is partly time barred. Secondly the authorities could not have denied the benefit of exemption under Notification No.4/06-CE dated 1.3.06, in view of the fact that the owner of the brand name had duly assigned the right to use the brand name by the appellants for their product. Thirdly the Commissioner could not have confirmed the demand based on second show cause notice in relation to the same period. Reliance is sought to be placed in the decision in the matter of **Larsen & Toubro Ltd. vs CCE, Pune-III** reported in 2007(211)ELT.513, **Pahwa Chemicals Private Ltd. vs CCE, Delhi** reported in 2005(189)ELT.257(SC) and **Gopal Zarda Udyog vs CCE, New Delhi** reported in 2005(188)ELT.251(SC) in relation to the point raised pertaining to bar of limitation. Reliance is placed in the decision in the matter of **CCE, Goa vs Primella Sanitary Products** reported in

2005(184)ELT.125(SC) and **CCE, Chennai vs Sree Ram Perfumery Works** reported in 2009(241)ELT.89 in relation to the entitlement for benefit under the Notification and in the matter of **CCE, Indore vs Siddharth Tubes Ltd.** reported in 2004(170)ELT.331 in support of contentions about illegality in confirming the demand in relation to the second show cause notice pertaining to the same period.

6. Learned Advocate appearing for the appellants drawing our attention to the copy of the agreement between M/s Kamdhenu Ispat Ltd. and the appellants as also the copies of invoices relating to the product manufactured by the appellants submitted that the respondent erred in accusing the appellants of suppression of facts when it was to the knowledge of the audit party and other officers of the Department that the appellants had been clearing the product as 'Kamdhenu' and therefore as there was no case of any suppression of fact as such by the appellants, the respondent could not have invoked the extended period of limitation. He further submitted that the first show cause notice dated 9.1.08 related to the period from 1.7.06 to 31.9.07 and the second show cause notice also includes the same period with addition of few more months. The fact that the appellants had been manufacturing cement with the name 'Kamdhenu' was within the knowledge of the Department when the first show cause notice was issued. Merely by alleging suppression of fact, the respondents were not entitled to issue the second show cause notice and make further demand of duty.

Referring to the decision of the Hon'ble Supreme Court in the case of Primella Sanitary Products and of the Tribunal in Sree Ram Perfumery Works, he submitted that the manufacturer using the brand name of another, on assignment of right to use such brand name, is not disentitled to claim benefit under the said Notification No.4/06. According to the learned Advocate the decision of the Commissioner therefore, is not in consonance with the law laid down by the Hon'ble Supreme Court and the Tribunal in relation to the matter in issue. In any case the fact that the product manufactured by the appellants was cleared in the name of Kamdhenu Cement was known to the Department.

7. On the other hand, the learned DR drawing our attention to the decision of the Tribunal in the matter of **Grasim Industries Ltd. vs CCE, Trichy** reported in 2006(201)ELT.565 and taking us to the impugned order submitted that the authorities below has taken into consideration all the facts placed on record and has come to a correct conclusion and finding and the same do not warrant any interference.

8. As regards the first ground of challenge undoubtedly the period involved in the matter is from July,2006 to January,2008 and the first show cause notice was issued on 9.1.08 whereas the second show cause notice was issued on 15.5.08. If we peruse both the show cause notices and the impugned order, it is apparent that the first show cause notice was issued in relation to the failure on the part of the appellants to submit the required

declaration under the said notification in order to enable manufacturer to avail the benefit thereunder. The condition 1(i) in the Annexure to the said notification clearly reads thus –

> "If the cement manufacturer makes a declaration to the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be, having jurisdiction regarding the installed capacity of the factory before availing of exemption under this notification or wherever there is a change in the said capacity, and furnishes such information or documents, if any, as may be required by the Deputy Commissioner or the Assistant Commissioner, as the case may be, for his satisfaction in this regard".

9. Obviously the manufacturer is not entitled to claim exemption suo moto without proper intimation. In that regard however, the condition clearly specifies that the manufacturer has to make declaration prior to availment of the exemption. The condition not only provides for the obligation of the manufacturer to make such declaration but also discloses the purpose for which such declaration is required to be made by the manufacturer. The condition specifies that pursuant to such declaration, the Excise Officer may call for necessary information and documents from the manufacturer for the purpose of his satisfaction as regard to the matter disclosed by the manufacturer in the declaration. Such condition cannot be said to be an empty formality. The same has to be strictly complied with in order to avail the benefit under the said notification.

10. It is, however, sought to be contended on behalf of the appellants that the appellants did file such declaration and that the same was sent under Postal Certificate to the concerned

Assistant Commissioner. The learned DR, however, drawing our attention to the decision in the matter of **J.Mitra & Co. Ltd. vs CCE, New Delhi** reported in 2002(140) ELT.524 submitted that communication by way of certificate of posting cannot be taken as conclusive proof. The fact remains that the Commissioner has dealt with this issue in detail. It has been clearly observed by the Commissioner in the impugned order that though the assessee had sought to contend that they had sent a declaration under Postal Certificate to the Asstt. Commissioner, undisputedly the same was claimed to be sent on 1.1.08 whereas the concessional rate of duty was sought to be claimed w.e.f. 1.7.06. Being so, the Commissioner has held that there was no declaration in accordance with the provisions of law comprised under the said notification. Indeed the notification clearly required submission of declaration prior to availment of the benefit under the notification. Not only that, as rightly pointed by learned DR, compliance of this condition cannot be by mere sending a declaration under Postal Certificate, but it need to be submitted to the concerned officers as he is empowered to call for further information or documents as may be necessary to get himself satisfied about the claim made by the manufacturer. On both the counts, therefore, it cannot be said, as rightly observed by the Commissioner that there was valid and lawful declaration by the appellants under the said notification to claim the benefit thereunder. Obviously the Condition 1(i) of the Notification does not appear to have been complied with by the appellants.

11. Besides, the fact that the declaration was claimed to have been sent under Postal Certificate to the Excise Officer on 1.1.08, obviously proves that there was no declaration prior thereto. This fact was also brought to the notice of the Department in the reply filed to the show cause notice. In such circumstances, it is difficult to accept the contention on behalf of the appellants in relation to first show cause notice.

12. As regards the second show cause notice, the same was issued in relation to the use of brand name of another person for the product manufactured and cleared by the appellants while claiming exemption under Notification No.4/06. On the face of the show cause notice itself, it reveals that the fact that the name 'Kamdhenu' was the brand name of another person was revealed to the Department for the first time in February,2008 when the statement of the appellants' Director was recorded by the Department. It was in the said statement of the appellants' Director revealed that the appellants had been using the name 'Kamdhenu Cement' for the product manufactured by the appellants, pursuant to an agreement dated 15.2.06 between Kamdhenu Ispat Ltd. and the appellants. To the specific query as to whether any of the documents on records disclosed that the name "Kamdhenu Cement" belongs to some other person and this fact was revealed to the Department, the learned Advocate fairly submitted that he has not come across any such document prior to the said statement of the appellants' Director. Obviously, therefore, the Department was justified in accusing the appellants

of suppression of the fact of use of the brand name 'Kamdhenu' belonging to another person. The fact that the name 'Kamdhenu Cement' was a brand name of Kamdhenu Ispat Ltd. was clearly admitted by the appellants' Director in his statement dated 7.2.08 and duly supported by the copy of the agreement produced by the appellants themselves.

13. The learned Advocate for the appellants drawing our attention to the Explanation clause to condition 1(iii) submitted that the term brand name has to be understood as explained in the said explanation clause. The explanation clause reads thus -

> "Explanation – For the purposes of condition (iii), "brand name" or 'trade name' means a brand name or trade name, whether registered or not, that is to say, a name or a mark, such as a symbol, monogram, signature, or invented words or any writing which is used in relation to a product for the purpose of indicating, or so as to indicate, a connection in the course of trade between the product and some person using such name or mark with or without any indication of the identity of that person".

14. At the outset it is to be noted that in a case where there is no dispute that the name used by the manufacturer for his product is a brand name of another person, taking resort to the explanation clause does not arise at all. Even otherwise, if we peruse the explanation clause, it lends no support to the case pleaded by the appellants. Plain reading of explanation would disclose that the name which is used in relation to a product for indicating some connection of that product in the course of trade with the person using such name then it would be a brand name of that person. It is not in dispute that 'Kamdhenu Cement' is a brand name of Kamdhenu Ispat Ltd. In fact having admitted so,

they have even produced copy of the agreement entered into between the appellants and M/s. Kamdhenu Ispat Ltd. for that purpose.

15. The right of the appellants to use the said brand name pursuant to the agreement between the parties cannot entitle the party to contend that it ceased to be the brand name of another person or that it would become an exclusive brand name of the manufacturer. The agreement between manufacturer and the owner of the brand name may entitle the manufacturer to use such brand name for his product without any objection from the owner of the brand name. But that by itself will not result in amending the conditions of exemption notification. The exemption notification clearly requires that the benefit thereunder would not be available to the manufacturer of the cement bearing a brand name or trade name, whether registered or not, of another person. It does not make any exception when such use is permitted by the owner of the brand name. Irrespective of the fact whether the manufacturer has full consent of the owner of the brand name to use such brand name for his product or not, the use of such brand name would disentitle the manufacturer of cement from claiming any benefit under the said notification.

16. Learned Advocate for the appellants has drawn our attention to two decisions, one of the Hon'ble Supreme Court and the another of the Tribunal. The order of the Hon'ble Supreme Court in the case of **Primella Sanitary Products** reads thus –

"This appeal is against the Judgment of the Customs, Excise and Gold(Control) Appellate Tribunal(ub sgirt "CEGAT") WZB at Mumbai dated 22nd February'2001.

2. The short question for consideration is whether the Respondent was entitled to the benefit of Notification No.175/86-CE, dated Ist March,1986 and Notification No.1/93, dated 28th February,1993. The only ground on which the adjudicating authority had denied the benefit of the Notifications was that the Respondent was using on their products the words "Comfit Always" which was a registered trademark of one M/s. Christine Hodein(I) Pvt. Ltd. The adjudicating authority held that the Assignment dated 28th June,1987, for a consideration of Rs.100/-, was not a bona fide assignment.

3. CEGAT has held that in view of the assignment, it could not be said that the Respondent was not entitled to use the mark "Comfit Always". The Tribunal has held that so long as the Assignment stands, the Respondent is entitled to the benefit of these Notifications.

4. In our view, there is no infirmity in the order of the Tribunal. We see no reason to interfere. The Appeal stands dismissed. There will be no order as to costs".

17. Plain reading of the above quoted order would disclose that Hon'ble Supreme Court was dealing with the matter involving the point as to whether the assessee was entitled to the benefit of the Notification No.175/86-CE dt.1.3.86 and Notification No.1/93 dated 28.2.1993. Therein the benefit was sought to be denied on the ground that the manufacturer was using for their products the expression "Comfit Always" which was a registered trademark of another company. There was a clear finding by the adjudicating authority that the Assignment dated 28th June,1987 by the company for a consideration of Rs.100/- was not a bona fide assignment. In the background of these facts, the Tribunal had

set aside the order of the adjudicating authority and held that so long as Assignment stands, the assessee would be entitled to the benefit under the notification. In that context, the Apex Court has observed that there was no infirmity in the order of the Tribunal. There was no law laid down as such on the issue which is sought to be canvassed in the matte in hand, nor the issue whether the use of brand name pursuant to consent by the owner thereby would entitle the manufacturer to claim benefit of exemption notification subject to the condition as is found in the notification in question was before the Apex Court or Tribunal nor any such issue has been dealt with in the said decision. Under the notification in question bonafide user of others trade name are not included under the exclusion clause. Besides, it must be noted that we are not benefited of perusing the conditions which were attached to the Notification No.175/86 and Notification No.1/93. In what circumstances, the Tribunal had held that so long as assignment stands, the assessee would be entitled to the benefit of notification, is also not known.

18. In Sree Ram Perfumery Works' case, the manufacturer was claiming right to use the brand name by virtue of an Assignment. Having noted the said fact, the Tribunal proceeded to observe regarding the decision of Apex Court in Primella Sanitary Products as under:

> "The short question for consideration is whether the Respondent was entitled to the benefit of Notification No.175/86-CE, dated Ist March,1986 and Notification No.1/93, dated 28th February,1993. The only ground on which the adjudicating authority had denied the benefit of

> the Notifications was that the Respondent was using on their products the words "Comfit Always" which was a registered trademark of one M/s. Christine Hodein (I) Pvt. Ltd. The adjudicating authority held that the Assisgnment dated 28th June,1987, for a consideration of Rs.100/-, was not a bona fide assignment".

19. As already observed above, Apex Court in Primella Sanitary Products has not laid down any proposition of law as such. Being so, with utmost respect to the Members of the Tribunal in the matter of Sree Ram Perfumery Works, we fail to understand as to how one can assume that the Apex Court in Primella Sanitary Products has held that a party using another brand name with the consent of such another person would not be barred from claiming benefit under exemption notification which notification clearly provides that use of such brand name would disentitle the manufacturer from claiming the benefit under the notification.

20. For the reasons stated above, therefore, the contentions sought to be canvassed in the matter on behalf of the appellants cannot be accepted.

21. As regards the third ground of challenge, the Tribunal in the case of Siddharth Tubes Ltd. had held thus -

> "It has not been controverted by the Revenue that the facts in both the proceedings - before the Assistant/Deputy Commissioner and the Commissioner - relates to the demand of duty on the post removal expenses. It has also not been denied by the Revenue that the period involved also in both the proceedings is same. The Revenue's contention is that the grounds for recovery of duty are, however, entirely different. The question is whether the show cause notice can be issued on the same issue and for the same period twice on different grounds. The answer is in negative".

22. Obviously, the ruling applies to the case where both the show cause notices relates to the same issue. Merely because two show cause notices are issued for the same period in relation to two different issues, the said decision will have no application. It is settled law that the law laid down under a judgment is to be understood with reference to the facts of the case and the points which has arisen in those facts. In the case in hand, the two show cause notices were issued on two different grounds in relation to two different issues. The first show cause notice related to failure on the part of the appellants to submit the declaration which was required to be submitted in terms of Condition I(i) of the notification, whereas the second show cause notice was on account of violation of the Condition I(iii)(b) of the notification. The two issues are totally independent and different from each other.

23. As regards the plea of limitation is concerned, the decisions in the matter of L&T Ltd., Pahwa Chemicals Pvt. Ltd., and Gopal Zarda Udyog are not attracted in the facts of the case in hand. Those decisions would be relevant when the allegation of suppression of fact would not be sustainable in case where there was opportunity for the Department to know about the facts which are stated in support of allegation of suppression. In the case in hand by mere reference to the invoices, there was no opportunity for Department to know that the expression 'Kamdhenu Cement' was a brand name of another person. The so called declaration is also alleged to have been submitted only on

1.1.08 whereas the period relates upto January,2008. Thus, there was neither any opportunity to the Department to know the fact that the appellants had been manufacturing the product in a name which was the brand name of another person nor the appellant themselves had disclosed the relevant facts before availing the benefit under the notification. In such circumstances, the rulings in the said decisions are of no help to the appellants. For the reasons stated above, we find no case for interference in the impugned order, as far as it relates to demand of duty and interest thereon as well as imposition of penalty against the company is concerned. The appeals in that regard fail.

24. We however, find that the impugned order does not disclose justifiable reason for imposition of the penalty of Rs.10,00,000/- against the appellants' Director. Taking into consideration all the facts and circumstances of the matter, in our considered opinion, sum of Rs.50,000/- would be a justifiable amount of penalty against the Director. Accordingly, appeal filed by the appellants' Director is thereby allowed and penalty imposed against him is reduced to Rs.50,000/-.

25. The appeals are accordingly disposed of in above terms.

(Justice R.M.S.Khandeparkar)
President

(Rakesh Kumar)
Member Technical

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