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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/5947/2004 - EX[DB]

Date 31/03/2010

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

To :
C.C.E. KANPUR
117/7, SARVODAYA NAGAR, KANPUR 208005.

C.C.E. KANPUR — Appellant

Vs

U.P.ENGINEERING CORPOTAION — Respondent

I am directed to transmit herewith a certified copy of **Final order No. 123/ 2010 EX[DB]** dated 23-2-10 passed by the Tribunal under Section 35-C(1)of Central Excises Act, 1944

Assistant Registrar
(Excise Appeal Branch)

Copy to :
1. Respondent
   U.P.ENGINEERING CORPOTAION
   117/0/62, GEETA NAGAR, KANPUR.
2. Adv. / Consult

NONE

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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Assistant Registrar
(Excise Appeal Branch)

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH - COURT NO. 1

Excise Appeal No. 5947 of 2004

(Arising out of Order-in-Appeal No. 480/CE/APPL/KNP/04 dated 28.09.2004 passed by the Commissioner of Central Excise, Kanpur).

DATE OF HEARING : 23.02.2010
DATE OF DECISION : 23.02.2010

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?	

CCE, Kanpur ..... **Appellant**
(Rep by Sh. Nitin Anand, DR)

VERSUS

M/s U.P. Engineering Corpn. ..... **Respondents**
(Rep. by NONE)

CORAM : HON'BLE MR. JUSTICE RMS KHANDEPARKAR, PRESIDENT
HON'BLE MR. RAKESH KUMAR, MEMBER (TECHNICAL)

FINAL **ORAL ORDER NO.** 123/10-EX

PER JUSTICE R.M.S. KHANDEPARKAR :

Heard the learned DR for the appellant and none present for the respondents.

2. Since in spite of repeated efforts to serve the respondents with the notice on the registered address, notices were returned unserved, by order dated 05th August, 2009 while directing to issue fresh notice, it was clearly noted that, the appellant has to take necessary steps to serve the respondents and if necessary to serve the notice by affixation thereof by following the procedure as prescribed under Section 37C(1)(b) of the Central Excise Act, 1944. Learned DR has informed that the directions in that regard have been duly complied with and has placed on record a copy of the report in that regard along with that of the Panchnama drawn in the presence of the panchas about the service of notice. In view thereof, it has to be held that the respondents are duly served and yet they have failed to appear before the Tribunal.

3. In view of absence of the representative on the part of the respondents, we have perused the entire records with the assistance of the learned DR.

4. The present appeal is against the order dated 28.09.2004 passed by the Commissioner (Appeals), Kanpur. By the impugned order the appeal filed by the respondents against the order of the adjudicating authority has been allowed and the proceedings have been dropped. By order dated 11th May, 2001, the Deputy Commissioner, Kanpur, had confirmed the demand of Rs. 11,38,578/- against the respondents while disallowing the modvat credit of the equal amount sought to be claimed by the respondents for the period from December, 1999 to February, 2000, besides ordering payment of interest on the said amount and

imposition of penalty of Rs. 500/-. The said demand was confirmed with reference to the show cause notice dated 27th December, 2000 issued by the Department for the same.

5. The respondents were engaged in the manufacture of Ballot Boxes classifiable under sub-heading 83.03 of the 1st Schedule of the Central Excise Tariff Act, 1985. In the declaration filed by the respondents, they had opted to avail the benefit of the Notification No. 8/99-CE dated 28.02.1999. Accordingly, any unit could avail full exemption from duty on clearance upto Rs. 50 lacs and on clearance beyond Rs. 50 lacs and upto Rs. 1 crore, the excise duty @ 5% adv. was payable. It is the case of the Department that, pursuant to examination of RT-12 return, it was noticed that the respondents, while opting for the benefit under the said Notification, had not cleared the final product exceeding the value of Rs. 1 crore but, at the same time they had availed the modvat credit in relation to the inputs procured for manufacture of the final product. The show cause notice in that regard was issued on 27th December, 2000. However, the same could not be served on account of closure of the premises wherein the factory was situated. Efforts made to contact the owner of the respondents also proved futile and, therefore, the show cause notice was pasted to the main gate of the factory on 03.01.2001 in the presence of two panchas. Thereafter, a letter was received from the respondents on 30.01.2001 calling upon the Department to supply copy of the show cause notice to them. However, there was no reply filed by the respondents in the matter and even though opportunity was given to appear before the adjudicating authority, they had failed to appear before the authority and put forth their defence. The adjudicating authority on the basis of the materials placed before him by the Department held that as per the declaration submitted by the respondents on 20th December, 1999, the respondents

had claimed full exemption from duty on clearance of the final product on the basis of the Notification No. 8/99-CE dated 28.02.1999 and at the same time had availed credit under Rule 57-A on the duty paid on the inputs which were used in the manufacture of the final product. Considering the same, the credit was disallowed and the demand, as stated, was confirmed.

6. Being aggrieved by the order of the adjudicating authority, the respondents filed the appeal before the Commissioner (Appeals) which came to be allowed by the impugned order holding that, the service of show cause notice was made on 09.04.2001, that was more than one year beyond the relevant period and hence the claim was time barred, and secondly even on merits the respondents were entitled to avail the credit and they could not have been denied the benefit of the Notification No. 8/99-CE dated 28.02.1999.

7. The learned DR drawing our attention to the Notification No. 8/99-CE dated 28.02.1999 submitted that, the exemption available under the said Notification was clearly subjected to the condition that :

> **"The manufacturer shall not avail of the credit of duty under Rule 57A or Rule 57B of the Central Excise Rules, 1944, paid on inputs used in the manufacture of the specified goods cleared for home consumption, the aggregate value of first clearances of which, as calculated in the manner specified in the said Table does not exceed rupees one hundred lacs."**

Referring to the table it was submitted that, the clearance upto fifty lakh rupees did not carry any duty whereas clearance between fifty lakh rupees to hundred lakh rupees was subjected to 5% ad valorem duty. However, in terms of the said condition 2(iv), the manufacturer was not entitled to avail the modvat credit unless the clearance exceeds one hundred lakh of rupees. Referring to the facts of the case, he submitted that there is a clear finding by both the authorities that the respondents did not exceed the limit of one hundred lakh of rupees as regards the clearance of the final products and, therefore, applying the said condition of Notification No. 8/99-CE, the respondents could not have availed the credit and hence the Commissioner (Appeals) could not have found fault with the order passed by the adjudicating authority in that regard.

8. As regards the bar of limitation, learned DR submitted that the adjudicating authority had clearly held that, the notice was served in accordance with the provisions of law on 03.01.2001 and, therefore, merely because additional copy was furnished to the party on 09.04.2001 it could not have been considered as date of service of the show cause notice.

9. As regards the bar of limitation, indeed the adjudicating authority had clearly discussed the circumstances under which the copy of the show cause notice came to be issued to the respondents on 09.04.2001. It reveals that the show cause notice was, in fact, served upon the respondents in accordance with the provisions of law on 03.01.2001. The copy of the said notice which was furnished to the respondents on 09.04.2001 was pursuant to the request for the same by the respondents vide letter dated 30.01.2009. The observations in the order passed by the adjudicating authority clearly disclose that, furnishing of additional copy of show cause notice was pursuant to the request by the respondents for the same. The very fact that the respondents had requested for the copy of the said notice discloses that, on 03.01.2001 they were fully aware about the issuance of the show cause notice to them. However, since the said show cause notice was affixed to the door of the factory and perhaps respondent wanted to file

the reply to the same, they requested for additional copy thereof. As such the affixation of show cause notice to the door of the factory of the respondents was in accordance with the provisions of law. It could not have been considered, as failure of service of said notice upon the respondents on 03.01.2001. Being so, it cannot be said that the service of said show cause notice was beyond the period of limitation as is observed by the Commissioner (Appeals) and, therefore, the appellant is justified in contending that the finding in that regard by the Commissioner (Appeals) is totally perverse.

10. As regards the merits of the case, the condition no. 2(iv) of the Notification No. 8/99-CE dated 28.02.1999, which is required to be complied with by the manufacturer in order to claim benefit of the said Notification, clearly requires that, the manufacturer was not entitled to avail credit of duty under Rule 57A unless the manufacture of the final product had exceeded the limit of hundred lakh of rupees, and in the case in hand the respondents had not exceeded the said limit. As rightly contended by the learned DR, the respondents could not have at the same time availed the credit of duty under Rule 57A. Being so, the finding arrived at in that regard by the adjudicating authority also could not have been found fault with by the Commissioner (Appeals). One fails to understand as to how the Commissioner (Appeals) could have held that, the appellant ought not to have denied the benefit of Notification No. 8/99 to the respondents in case they have availed the modvat credit. The availment of the benefit under the Notification No. 8/99 is optional and it is at the instance of the assessee and it cannot be forced upon by the Department on the assessee. In the case in hand, the respondents themselves had filed declaration seeking to avail benefit under the said Notification. Having done so, it was the duty of the respondents not to avail the credit of duty under Rule 57A unless they had crossed the limit

of hundred lakh of rupees in the manufacture of final product. Being so, the finding arrived by the Commissioner (Appeals) on merits of the case cannot be sustained and is liable to be set aside.

11. For the reasons stated above, the appeal succeeds and the impugned order is set aside and the order passed by the adjudicating authority is restored. The appeal is, therefore, stands allowed with consequential relief.

(JUSTICE R.M.S. KHANDEPARKAR)
PRESIDENT

RAKESH KUMAR)
MEMBER (TECHNICAL)

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