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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 06/09/2010

Appeal No. E/961 /2005 - EX[DB]

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

To :
C.C.E. MEERUT II
OPP. SAHEED PARK (NEAR ASHOK KI LAT) DELHI ROAD, MEERUT (UP) — Appellant
C.C.E. MEERUT II

Vs

Respondent

M/S CENTURY PULP&PAPER,

I am directed to transmit herewith a certified copy of **Final order No.** 637/2010 **EX[DB]** dated 04-8-10 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 CENTURY PULP&PAPER,
   GHANSHYAMDHAM, LALKUA DISTT. NAINITAL
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. Company Law Institute of India Pvt Ltd.,No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
9. M/s. Deeparchie Publications, M-93, Marg. 46, Saket, New Delhi 110017
10. Taxmann Allied Service Pvt Ltd., 59/32, New Rohtak Road, New Delhi - 110005
11. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road,Ahmedabad-15
12. LAWCRUX Advisors Pvt Ltd. LAW House,1-8,Sector - 10, Faridabad 121003 (Haryana)
13. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
14. Office Copy
15. Guard file
16. HON'BLE PRESIDENT

Assistant Registrar
(Excise 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. I

Excise Appeal No. 961 of 2005

[Arising out of the Order-in-Appeal No. 317-CE/MRT-II/2004 dated 15/12/2004 passed by The Commissioner (Appeals), Customs & Central Excise, Meerut – II.]

For Approval and signature :

Hon'ble Justice R.M.S. Khandeparkar, President
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, Meerut – II — Appellant

Versus

M/s Century Pulp & Paper — Respondent

Appearance

Shri K.P. Singh, Authorized Representative (DR) – for the appellant.

None – for the Respondent.

CORAM : **Hon'ble Justice R.M.S. Khandeparkar, President**
Hon'ble Shri Rakesh Kumar, Member (Technical)

DATE OF HEARING : 04/08/2010.
DATE OF DECISION : 04/08/2010.

FINAL Order No. 637/10-EX Dated : ___________

Per. Rakesh Kumar :-

The respondent are engaged in the manufacture of "writing & printing paper" falling under Chapter 48 of the Central Excise Tariff, out of conventional raw material – wood pulp as well as unconventional raw material – bagasse. During the period of dispute, the paper made from Bagasse was fully exempt from duty under exemption Notification No. 6/2000-CE dated 1/3/2000. According to Department, the Respondent, while availing input duty credit in respect of common inputs going into the manufacture of dutiable as well as exempted paper, have not maintained separate account and inventory of the inputs meant for dutiable paper and those meant for exempted paper in accordance with the provision of Rule 57CC (9), and on this basis, in respect of clearances of exempted paper, an amount equal to 8% of the sale price of the goods, under Rule 57CC (1) of the Central Excise Rules, 1944 has been demanded. Accordingly, a show cause notice dated 27/4/2000 was issued to the Respondent for –

(a) recovery of an amount of Rs. 5,07,711/- from the Respondent in respect of clearances of 210 M.T. of exempted paper during March 2000 alongwith interest under Section 11AB of Central Excise Act, 1944 ; and

(b) imposition of penalty on the Respondent under Section 11AC of the Act.

1.1 The show cause notice was adjudicated by the Assistant Commissioner, who vide order-in-original dated 27/4/01 dropped the demand of amount under Rule 57CC (1), but imposed penalty of Rs. 5,000/- on the Respondent under Rule 210 of Central Excise Rules for not following the procedure prescribed under Rule 57CC (9).

1.2 The Assistant Commissioner's order was reviewed by the Commissioner and a review appeal was filed before CCE (Appeals). The CCE (Appeals) vide order-in-appeal No. 317-CE/MRT-II/2004 dated 15/12/04, without going into the merits, dismissed the appeal on the ground that while the order-in-original was passed by Assistant Commissioner as Adjudicating Authority, the Commissioner in the order issued under Section 35E (2), directed the Deputy Commissioner to file the appeal and appeal has been filed by an officer, who admittedly, is not the adjudicating authority and hence could not file the appeal. Against this order of CCE (Appeals), the present appeal has been filed by the Revenue.

2. None appeared for the Respondent, though a notice for hearing had been issued and an acknowledgement had been received. Since on earlier occasion also, the Respondent, in spite of notice of hearing having been issued and acknowledged, had not turned up, in accordance with the provisions of Rule 21 of CESTAT Procedure Rules, this matter in respect of the Respondents is being decided ex-parte.

3. Heard Shri K.P. Singh, the learned Departmental Representative, who reiterated the grounds of appeal in the Department's appeal and emphasized that the Assistant Commissioner and the Deputy Commissioner have the same powers.

4. We have carefully considered the submissions of the learned Departmental Representative and have perused the records. In this case, the Commissioner (Appeals) has dismissed the Department's review appeal filed under the provisions of Section 35E (4) of the Central Excise Act, 1944 on the ground that the Adjudicating Authority, which passed the order-in-original reviewed by the Commissioner and the officer who filed the review appeal are different, that is, while the order-in-original had been passed by the Assistant Commissioner, the Commissioner in the review direction issued under Section 35 E (2) had directed the Deputy Commissioner to file the review appeal and it is the Deputy Commissioner who had filed the review appeal before the Commissioner (Appeals). The Commissioner (Appeals), on this basis has held that the review appeal has not been filed by the proper officer as stipulate in the Central Excise law.

4.1 Section 35E (2) and 35 E(4) of the Central Excise Act are reproduced below :

Section 35E (2) : "The Commissioner of Central Excise may, of his own motion called for and examine the records of any proceedings in which an Adjudicating Authority subordinate to him has passed any decision or order under this Act, for the purpose of satisfying himself as to the legality or property of any such decision or order and may, by order direct such authority to apply to the Commissioner (Appeals) for determination of such points arising out of decision or the order as may be specified by the Commissioner of Central Excise in his order".

Section 35E (4) : "Where in pursuance of an order under sub-Section (1) or sub-Section (2), the Adjudicating Authority or the authorized officer makes an application to the appellate Tribunal or the Commissioner (Appeals) within the period of three months from the date of communication and the order under sub-Section (1) or sub-Section (2) to the Adjudicating Authority, such application shall be heard by the appellate Tribunal or the Commissioner (Appeals), as in the case may be, as if such application were an appeal against the decision or order of the Adjudicating Authority and the provisions of this Act regarding appeals, including the provisions of sub-Section (4) of Section 35B shall, so far as may be applied to such application".

4.2 Hon'ble Supreme Court in the case of **Collector of Central Excise vs. M.M. Rubber Company** reported in **1991 (55) E.L.T. 289 (S.C.)** in para 6 of its judgment has held as under :-

"It may be seen that the direction to file an appeal under these two sub-sections by the Board and the Collector, as the case may be, is to the very Adjudicating Authority who would otherwise be have been bound by his own order and not expected to be aggrieved by the same. When an appeal is filed on such direction, the appellant will be the adjudicating authority himself and not the authority who gave the direction."

4.3 Relying upon the above judgment of Hon'ble Supreme Court, the Tribunal in the case of **Commissioner of Central Excise and Customs, Visakhapatnam vs. Ajit India (Hyderabad) P. Ltd.** reported in **2006 (200) E.L.T. 313 (Tri. – Bang.)** has held that the appeal filed by the authorities different from the one who passed the order-in-original is not valid, as on review, the appeal is required to be filed by the same authority which had passed the adjudication order. We find that same view has been taken by the Tribunal in the cases of **Commissioner vs. Flexoplast Abrasives (I) Ltd.** reported in **2003 (55) R.L.T. 233 (Tribunal), Dhampur Sugar Mills Company Ltd. vs. CCE, Meerut** reported in **1999 (108) E.L.T. 498 (Tribunal), Sun Export Corporation vs. Collector of Customs** reported in **1989 (42) E.L.T. 308 (Tribunal)**, and **Supreme Industries Ltd. vs. CCE, Indore** reported in **1999 (114) E.L.T. 1003 (Tribunal)**.

4.4 In this case there is no dispute about the fact that the Adjudicating Authority who passed the order and the officer, who filed the review appeal before the Commissioner (Appeals) are different and in view of the above-mentioned judgments of the Hon'ble Supreme Court and of the Tribunal, the review appeal cannot be said to have been filed by the proper officers as stipulated in the Central Excise law. In view of this, we do not find any infirmity in the impugned order. The Revenue's appeal is dismissed.

(Operative part of the order pronounced in the open court.)

(Justice R.M.S. Khandeparkar)
President

(Rakesh Kumar)
Member (Technical)

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