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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/2087/2009 - EX[DB] WITH E/S/2173/09-EX E/M/161/2010-EX   Date 10/05/2010

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

To :
M/S KUSHAL FERTILIZERS (P)LTD

112, VILLAGE- SUNEHRA, BEHIND INDL ESTATEM
RAM NAGAR, ROORKEE(UK)

M/S KUSHAL FERTILIZERS (P)LTD   Appellant

Vs

C.C.E. MEERUT I   STAY OORDER NO.329/10-EX & M.ORDER NO.306/10-EX   Respondent

I am directed to transmit herewith a certified copy of **Final order No. 283/ 2010 EX[DB]** dated 27-4-10 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. MEERUT I
   EXCISE CHOWK,OPPOSITE CHOUDHARY CHARAN SINGH UNIVERSITY MANGAL PANDAY NAGAR, MEERUT - 250005.
2. Adv. / Consult
   MR.SUNIL KUMAR JAIN, ADV.
   B-9, SAGAR APARTMENTS, 6, TILAK MARG, NEW DELHI-110001
3. CD.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. Office Copy
14. Guard file
15. HON'BLE PRESIDENT.

Assistant Registrar
(Excise Appeal Branch)

16. Tax India Online.Com (P) Ltd.
    Unit No.1, 2nd Floor, Vasant Aracade, Nelson Mandela Road,
    Vasant Kunj, New Delhi-70

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

DATE OF HEARING : 27/04/2010.
DATE OF DECISION : 27/04/2010.

Excise Appeal No. 2087 of 2009 with Stay Application No. 2173 of 2009 and Misc. Application No. 161 of 2010

[Arising out of the Order-in-Original No. 09/Commr/Mrt-I/2009 dated 26/03/2009 passed by The Commissioner, Customs & Central Excise, Meerut-I.]

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?	: Yes
2.	Whether it would be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	: No
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 Kushal Fertilizers (P) Ltd. Appellants

Versus

CCE, Meerut Respondent

Appearance

Shri Aneesh Mittal, Advocate – for the Appellants.

Shri Anil Khanna, Authorized Representative (DR) – for the Respondent.

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

Stay order No. 329/10-Ex
Final Order No. 283/10-Ex Dated : 27.4.2010
Misc order No. 306/10-Ex

Per. Justice R.M.S. Khandeparkar :-

Heard the learned advocate for the appellants and learned DR for the respondent. The appellants challenges the order dated 26th March 2009 passed by Commissioner, Meerut. By the impugned order, the learned Commissioner has confirmed the demand of central excise duty amounting to Rs. 57,80,363/- (Rupees Fifty Seven Lakh Eighty Thousand Three Hundred Sixty Three) and has imposed penalty of Rs. 1,50,000/- (Rupees One Lakh Fifty Thousand). The duty amount confirmed against the appellants relates to the period from 26th March 1990 to 31st March 1992.

2. The appellants were engaged in manufacture of M.S. Conduit pipes classifiable under Chapter sub-heading 7306.90 of the Central Excise Tariff Act, 1985. During the period from 1990-1992, the appellants had manufactured M.S. Conduit pipes by using Bars of non-alloy steel steels, flat rolled products of non-alloy steel below 5 mm in thickness, rectangular bars of non-alloy steels. They had not obtained registration from the Central Excise department for the manufacture of the said product. They had also not filed the required declaration in order to enable them to avail exemption under Notification No. 11/88-C Ex. dated 15th April 1988 issued under Rule 174A of the Central Excise Rules,

1944. The appellants after a period of ten months from the date of commencement of manufacture of the said product, wrote a letter dated 22nd January 1991 to Sector Officer, Central Excise, Range Roorkee, asking for a certificate confirming the exemption to their product from the levy of duty. Consequently, the investigation was carried out and the show cause notice dated 28th March 1994 came to be issued in relation to the period from 26th March 1990 to 31st March 1992 requiring the appellants to show cause against the demand of duty in relation to the manufacture 2694.697 M.T. of M.S. Conduit pipes. The proceedings were contested by the appellants which culminated in an order passed by the Commissioner on 21st July 1994, whereby Commissioner confirmed the demand of duty amounting to Rs. 57,80,000/- (Rupees Fifty Seven Lakhs Eighty Thousand) besides imposing penalty of Rs. 1,50,000/- (Rupees One Lakh Fifty Thousand). Being aggrieved, the appellants preferred appeal to the Tribunal and by order dated 23rd November 2000, the Tribunal set aside the order passed by the Commissioner and remanded the matter to decide the same afresh including the issue relating to the bar of limitation. Pursuant to the remand, the Commissioner reheard the matter and disposed the same by the order dated 22nd March 2004 confirming the duty as was confirmed under order dated 21st July 1994. Being aggrieved, the appellants preferred appeal to this Tribunal, which was disposed of by order dated 3rd of March 2005 while holding that the suppression of facts stopped from 22nd January 1991 and the extended period was applicable for the period prior to 22nd

January 1991. It was also held that the appellants were entitled for the benefit of Modvat credit. With those observations, the matter was remanded to the Commissioner for fresh order. The department being aggrieved, sought reference to the Hon'ble High Court of Uttarakhand, Nainital on the point as to whether wilful non-furnishing of information and non-obtaining of Central Excise license would constitute suppression of facts on the part of the assessee and, therefore, the demand even for the period subsequent to 22nd January 1991 in the case in hand was not barred by limitation. The Hon'ble High Court by its order dated 16th June 2008 answered the reference in favour of the department. Being aggrieved, the appellants carried the matter in appeal before the Hon'ble Supreme Court. By order dated 6th of May 2009, the Hon'ble Supreme Court allowed the appeal and held that since the Tribunal on assessment of the materials on record had arrived at a finding of fact that there was no suppression on the part of the assessee after 22nd January 1991, the authorities were not justified in invoking extended period of limitation for the period subsequent to the said date, bearing in mind the mandate of Section 11A of the Central Excise Act, 1944. It appears meanwhile, being unaware of the fact of disposal of the appeal by the Apex Court, the learned Commissioner disposed the matter by the impugned order dated 26th March 2009. Hence the present appeal.

3. The learned advocate for the appellants while fairly conceding that the finding arrived at by the Tribunal under order

dated 3rd March 2005 to the effect that the suppression of fact stopped from 22nd January 1991 and extended period was applicable only prior to 22nd January 1991 has attained finality in view of the confirmation of the said finding by the Apex Court, submitted that the learned Commissioner erred in ignoring the said finding in the order passed by the Tribunal even in the absence of confirmation thereof by the Apex Court. He further submitted that it was to the knowledge of the learned Commissioner that though the reference was answered by the Hon'ble High Court in favour of the department, the matter was under review in appeal before the Apex Court and that is apparent from the impugned order itself which makes reference to the proceedings pending in the Hon'ble Supreme Court. In any case, according to learned advocate as the matter stands today, the impugned order to the extent it relates to the period from 22nd January 1991 onwards is concerned is liable to be set aside in terms of the said order passed by the Tribunal and confirmed by the Apex Court.

4. On the other hand, the learned DR submitted that in view of the decision of the Apex Court it is not possible to support the finding to the extent it relates to the period after 22nd January 1991 out of the period from 26th March 1990 to 31st March 1992 is concerned.

5. Indeed the Tribunal by order dated 3rd March 2005 had clearly held that :

"we observe that in their letter dated 22nd January 1991, they had requested the department for certificate to the effect that their product is exempt from levy of duty. The department had thus acquired knowledge on receipt of the said letter, that the appellants are manufacturing tubes and pipes and are availing the benefit of exemption under notification No. 202/88. Whether further details were provided by the appellants or not in the said letter, the department cannot deny the fact that they had come to know about the appellants manufacturing tubes and pipes and availing benefit of exemption and nothing prevented the department from conducting investigation or seeking further information from the appellants. In view of this, we hold that the suppression of facts stopped from 22.01.1991 and extended period is applicable only prior to 22.01.1991. There is no force in the submission of the learned advocate that they had themselves intimated to the department about their manufacturing the goods and availing exemption. This does not wipe out the suppression of facts committed by them during the period prior to 22.01.1991."

It is also pertinent to note that the Apex Court in its order dated 6th May 2009 had clearly ruled that :

"If on the materials produced by the authorities, the Tribunal had arrived at a finding of fact that there had been no suppression on the part of the appellants after 22nd January 1991, the question of invoking extended period of jurisdiction did not arise."

6. It is thus apparent from the fact that there was no suppression of any fact from 22nd January 1991 onwards is concerned, there is a clear finding on this aspect by the Tribunal

and duly confirmed by the Apex Court, being so, it is not open for either of the parties to go beyond the said finding.

7. Considering the fact that the said finding has attained finality it is apparent that there was suppression of relevant fact prior to 22nd January 1991 i.e. for the period from 22nd March 1990 to 21st January 1991. Indeed, there is a clear finding to this effect by the Tribunal. Even otherwise the same clearly follows from the finding arrived at by the Tribunal and confirmed by the Apex Court. Obviously, therefore, the duty liability and consequent penalty in relation to the said period from 22nd March 1990 to 21st January 1991 cannot be disputed. As rightly submitted by the learned advocate for the appellants and not disputed by the respondent, question of imposition of any duty liability in relation to the period from 22nd January 1991 to 31st March 1992 cannot arise as there was no suppression of fact and the show cause notice was issued as late as on 28th March 1994.

8. In the facts and circumstances of the case, therefore, the impugned order to the extent it relates to the period from 22nd January 1991 onwards is concerned cannot be sustained and is liable to be set aside. There is no case for interference as far as the finding relates to the liability for the period from 22nd March 1990 to 21st January 1991; however, for the purpose of re-calculation of the duty amount and consequential penalty, the matter will have to be referred back to the Commissioner, who shall calculate the same after hearing the appellants within a

period of three months from the date of receipt the copy of this order of the Tribunal.

9. The appeal is accordingly disposed of in the above terms.

(Justice R.M.S. Khandeparkar)
President

(Rakesh Kumar)
Member (Technical)

PK