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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/1467/2009-1468/2009,2709/2009 - EX[DB] Date 12/05/2010
E/S/1488-1489,2789/09-EX

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

To :
C.C.E. JAMMU
OB-32, RAIL HEAD COMPLEX, JAMMU - 180012.

C.C.E. JAMMU — Appellant

Vs

M/S METAL EXTRUSIONS — STAY ORDER NO.342-344/2010-EX — Respondent

I am directed to transmit herewith a certified copy of **Final order No.** 324-326/ 2010 EX[DB] dated 03-5-10 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 METAL EXTRUSIONS
   PLOT NO 154 SICOP INDUSTRIAL ESTATE HATLI MORE KATHUA (J&K)
2. Adv. / Consult SH. P. SHARMA, ADV.,
   C/O RESPONDENT.

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 Office Copy
14 Guard file
15. HON'BLE PRESIDENT.
16. M/S METAL EXTRUSIONS,
    PLOT NO. 154, SICOP INDUSTRIAL ESTATE,
    HATLI MORE. KATHUA (J&K)

Assistant Registrar
(Excise Appeal Branch)

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

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
West Block No. 2, R.K. Puram,
NEW DELHI

COURT NO. I

E/STAY/1488-1489, 2789/2009 IN AND CENTRAL EXCISE APPEAL NO. 1467-68, 2709 OF 2009

[Arising out of Order-in-Appeal No.121-123/CE/Appl/Jal(JK)/09 dated 16.02.2009 passed by the Commissioner (Appeals), Central Excise, Jalandhar (Hqrs. at Chandigarh)]

Dated of hearing/decision: 3rd May, 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 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 Departmental authorities?	Yes

CCE, Jammu — Appellant

Vs.

M/s. Metal Extrusions — Respondent

Appearance:

Shri B.L. Soni, Authorised Representative (SDR) for the Revenue;
Shri P. Sharma, Advocate for the respondents

Coram:

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

FINAL **ORAL ORDER NO.** 324-326/10-EX **dated**
STAY ORAL ORDER NO. 342-344/10-EX

Per Justice R.M.S. Khandeparkar:

Having heard the learned D.R. and the learned Advocate for the respondents at length, we propose to dispose of the appeals themselves. Hence, the applications are disposed off.

2. Since common questions of law and facts arise in all these appeals they were heard together and are being disposed of by this common order.

3. These appeals arise from order dated 16.2.2009 passed by the Commissioner (Appeals), Chandigarh whereby appeals filed by the respondents against the order of the adjudicating authority were allowed, holding that the respondents were eligible for the benefit of area based exemption notification No. 56/2002-CE dated 14.11.2002 w.e.f. 26th August, 2006 as the production in their factory commenced from that date, subject to fulfilling the other requirements and eligibility criteria under the said notification. The adjudicating authority by order dated 7.3.2008 had rejected the refund application filed by the respondents.

4. The respondents are engaged in the manufacture of Low Voltage Contracts (Electrical), Brass Alloy Ingots and Silver Residue classifiable under Tariff Item No. 85389000, 74032100 and 71129920 of the first

Schedule to the Central Excise Tariff Act, 1985. The respondents have their factory in the SICOP Industrial Area, Hatli More, Kathua (J&K). The respondents claiming the exemption benefit under notification No. 56/2002-CE dated 14.11.2002, filed an application for refund claim by way of self credit for Rs. 41,69,237/- on account of excise duty paid through PLA for the month of October, 2006 which ~~formed~~ was the subject matter of appeal before the Commissioner (Appeals) in appeal No. 297/2008, sum of Rs. 23,29,015/- for the month of November, 2006 which was the subject matter of appeal No. 298/08 before the Commissioner (Appeals) and a sum of Rs. 6,95,668/- for the month of September, 2006 which was the subject matter in appeal No. 299/08 before the Commissioner (Appeals). The claim for refund was filed on the ground that production in the appellants factory had commenced from 26th August, 2006.

5. The adjudicating authority rejected the said claim on the ground that the Range Officer under his letter dated 31.1.08 had stated that commencement of production was from 20.12.2006 in terms of TMT certificate issued by the General Manager, DIC, Kathua and, therefore, the benefit of exemption notification would not be admissible prior to that date and refund claim, therefore, would not be granted. Being aggrieved, the respondents preferred appeals before the Commissioner (Appeals). By the impugned order the Commissioner (Appeals) held that monthly returns filed by the respondents for the month of September,

October and November, 2006 disclosed figures of production and clearances from the factory. The returns filed by the respondents apparently disclose the stamp of Range office, Kathua of having received the said returns in their office. The certificate issued by the industrial department disclose the provisional registration certificate revealing the date of commencement of production to be 26th August, 2008. Based on these grounds the Commissioner (Appeals) allowed the appeals filed by the respondents and ordered the refund.

6. The learned D.R. while assailing the impugned order submitted that the certificate relied upon by the Commissioner (Appeals) to hold that production had commenced from 26th August, 2006 does not disclose any such date of commencement of production and it is not known from where the Commissioner (Appeals) had read such date of 26th August, 2006 in the said certificate to be the date of commencement of production. A copy of the certificate was produced for our perusal. He further submitted that the notification in question under clause (4) requires the period of 10 years to be counted from the date of commencement of the commercial production. It may be that in the month of September to November the Respondents might have carried out production on trial basis which cannot be construed as production on commercial basis. Further, drawing our attention to Circular No. 682/73/2002-CX dated 19.12.2002 he submitted that the same requires certificate from the department of industries of the State Government to

decide about the date of commencement of production and in the case in hand such a certificate issued by the competent authority disclosed commencement of commercial production from 20.12.2006. Attention was drawn to the decision of the Tribunal in the matter of Suvi Cement Indus. Pvt. Ltd. vs. CCE, Jammu, reported in 2007 (216) ELT 455 (Tri. – Del.).

7. On the other hand, learned Advocate for the respondents drawing attention to the copies of the returns filed by the respondents for the month of September, October and November submitted that the returns clearly disclose the quantity of goods produced as well as the assessable value thereof which would clearly disclose that by no stretch of imagination the production in the months of September, October, and November was on trial basis. He further submitted that notification on the face of it nowhere require any certificate from the State Government or any of its department to decide the date of commencement of production. From the fact that the respondents filed monthly returns regarding the production from the factory which were not objected to nor disputed by the department for the month of September, October and November, 2006, the same would disclose that production in the respondents factory had commenced from September, 2006 itself. Added to this the provisional registration certificate was issued in August, 2006 which would also disclose that the respondents had commenced

production after taking appropriate steps to obtain necessary certificate to enable the respondents to commence the production.

8. Perusal of the notification in question discloses that the manufacturer intending to avail the benefit of notification is entitled to opt for the option provided under the notification and in that regard he as to file appropriate declaration with the department. Obviously, declaration would include date from which the manufacturer would seek to avail the benefit of the said notification. It is not known as to why the department did not chose to refer to such declaration nor there is any finding to that effect that the respondents had failed to file any such declaration.

9. The notification under clause (4) undoubtedly provide that the exemption contained in the said notification shall apply to any of the units for a period not exceeding 10 years and 10 years should be counted from the publication of the said notification in the official gazette or from the date of commencement of production which ever is earlier. In other words clause (4) merely states that the period of ten years for the benefit under the notification should be counted from the date of publication of notification or from the date of commencement of the production, and nothing beyond that.

10. The question as to whether the manufacturer hass commenced the production in the factory or not is essentially a matter of fact which is to be ascertained by taking into consideration the date of actual production

in the factory. Undoubtedly, certificate issued by different competent authorities in this regard would carry evidentiary value. But in a case where the manufacturer who is statutorily required to disclose to the Excise Department the commencement of the manufacturing activity in such factory by filing proper declaration and such party in compliance with provision of such law files such declaration in that regard with the Excise Department and such declaration and the monthly reports of production are accepted by the department without any objection and without raising any dispute about the factum of production in the factory it will be highly improper for the department thereafter to dispute the fact of commencement of production in the factory for such period. In the case in hand undisputedly the respondents had filed declaration as well as ER-1 returns for the month of September, October, and November 2006 within the prescribed period and the same disclosed the production of goods of which assessable value was Rs. 74,67,974-25, Rs. 2,60,57,725/-, and Rs. 1,49,33,646/- for the month of September, October and November, 2006 respectively which clearly disclose that the production was not on trial basis but on commercial basis. When such records were available with the department which disclosed actual production on commercial basis having commenced from September, 2006 onwards, we fail to understand how the department on the basis of mere certificate of the Director of Industries stating that the production had commenced from 20.12.2006 could reject the claim of the respondents.

11. The decision of the Tribunal in Suvi Cement Indus. Pvt. Ltd. is of no help to the appellants. The said decision nowhere lays down any proposition of law as such. The decision is entirely based on factual matrix of the said case and it is evident from para 8 of the said decision which read thus:-

> "We do not find any valid reason to go behind the correctness of the said certificate which records the fact that the appellant could not produce the cement an dput it to commercial sale in absence of BIS Certificate. It also appears that only ad hoc permission was granted by the Ministry of Industries and Commerce under the communication dated 7-5-2002 for a period of 60 days w.e.f. 8-5-2002. Moreover, an approval from the Director of Industries and Commerce was received by the District Industries Centre only on 10.6.2002. It is thereafter that this certificate had been issued by the said authority showing that the appellant had started commercial production only from 15-6-2002. The facts, therefore, clearly indicate that the earlier date of production 10-2-2002 mentioned in the certificate of permanent registration was not the date of commencement of commercial production and that some trial production may have been done at that time. In the above view of the matter, the impugned order cannot be sustained and is hereby set aside with consequential relief."

12. The Circular date 19.12.2002 merely advices departmental persons that as regards the date of commencement of production the Department of Industry of the State Government may be consulted who should be in a

position to advice on that aspect. The said advise cannot be construed as a direction to ignore the returns filed by the manufacturer disclosing the actual production in the factory.

13. It is true that the provisional certificate on the face of it nowhere disclose production having commenced from 26th August, 2006. However, the same is immaterial for the decision in the matter in hand wherein undisputedly returns filed by the assessee clearly disclose that the production had started from September, 2006.

14. For the reasons stated above we find no reason to interfere in the impugned order. Hence, appeals fail and are accordingly dismissed.

(JUSTICE R.M.S. KHANDEPARKAR)
PRESIDENT

(RAKESH KUMAR)
MEMBER (TECHNICAL)

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