

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066
EXCISE APPEAL BRANCH

Appeal No. E/1328/2005 - EX[DB]

Date 14/03/2011

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

To :
C.C.E.INDORE

P.B.NO-10 MANIK BAGH PALACE INDORE M.P.

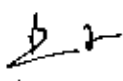
C.C.E.INDORE

Appellant

M/S S.K.INDUSTRIES PVT.LTD.

Vs
Respondent

I am directed to transmit herewith a certified copy of Final order No. 290/ 2011 EX[DB] dated 24-2-11
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 S.K.INDUSTRIES PVT.LTD.
PLOT NO-131-A, INDUSTRIAL AREA
MALANPUR, DISTT. BHIND (MP)

2. Adv./Consult *SH. P. RANJAN KLIMAR, ADV.,
(EN. NO. D/55A/1998)
6/33-33A, VIKARAM VIHAR,
LAJPAT NAGAR - IV, N. DELHI - 21*

3. C.D.R

4. Bar association, CESTAT, New Delhi

5. Director Publications, Customs, Excise, I.P. Estate, New Delhi

6. M/s Centax Publications Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi -

7. Company Law Institute of India Pvt Ltd., No.2 (Old No. 36), Vaithyaram Street, T. Nagar, Chennai -17

8. M/s. Deeparchie Publications, M-93, Marg. 46, Saket, New Delhi 110017

9. Taxmann Allied Service Pvt Ltd., 59/32, New Rohtak Road, New Delhi - 110005

10. Easy Service Tax Online Dot Com Pvt.Ltd.407A, Iscon Mall, Above Star India Bazar, Satellite Road,
Ahmedabad-15

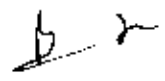
11. LAWCRUX Advisors Pvt Ltd. LAW House, 1-8, Sector - 10, Faridabad 121003 (Harvana)

12. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor, Vasant Arcade, Nelson Mandela Road,
Vasant Kunj, New Delhi - 110070

13. Office Copy

14. Guard file

15. HON'BLE PRESIDENT.


Assistant Registrar
(Excise Appeal Branch)

I
CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
WEST BLOCK NO.II, R.K. PURAM, NEW DELHI-110066.
Court No. I

Date of Hearing/Decision: 24.02.2011

For approval and signature:

Hon'ble Shri 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 should 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?	See
4.	Whether Order is to be circulated to the Departmental authorities?	Yes

Excise Appeal No. 1328 of 2005

[Arising out of order in appeal No. IND-I/20/2005 dated 31.01.2005 passed by the Commissioner (Appeals-I) Customs & Central Excise, Indore].

CCE, Indore

Appellants
[Rep. by Shri Sunil Kumar, DR]

Vs.

M/s S.K. Industries (P) Limited

Respondent
[Rep. by Shri P. Ranjan, Advocate]

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

FINAL ORAL ORDER NO. 290/2011-EX

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

Heard the DR for the appellant and learned Advocate for the respondents.

2. The appeal arises from order dated 31.01.2005 passed by the Commissioner (Appeals), Indore. By the impugned order, the Commissioner (Appeals) has allowed the appeal filed by the respondents against the order passed by the adjudicating authority and has set aside the demand and penalty. The Assistant Commissioner, Gwalior by his order dated 31.08.2004 had confirmed the duty amounting to Rs. 4,62,134/- with interest and penalty of Rs. 10,000/-.
3. The respondents are engaged in manufacture of fruit jelly with brand name Jelly-Belly filled in plastic containers in the shape of toys, falling under chapter heading No. 2001 of the first schedule to the Central Excise Tariff Act, 1985. On visit to the factory premises of the respondents by the preventive officer by the excise department, it was revealed on 16.01.2003 that the respondents had been classifying the product under chapter sub-heading No. 2001.10 attracting Nil rate of duty by virtue of Notification No. 6/2002-CE dated 01.03.2002. The respondents were manufacturing plastic containers in the shape of toys for filling fruit jelly. The said plastic containers were classifiable under heading 3923 and were liable to duty to the tune of 16% adv. It was noticed that the respondents while availing the benefit of Notification No. 67/95-CE dated 16.03.1995 as amended were clearing the plastic containers for captive consumption at nil rate of duty. However, as per the provisions of Notification No. 8/2003-CE dated

01.03.2003, the exemption benefit was restricted to the first clearance of specified goods upto an aggregate value of Rs. 1 crore provided that the clearance of all the excisable goods in the preceding financial year had not exceeded Rs. 3 crores. In case of the respondents taking into consideration the sale of all the excisable goods manufactured in the financial year 2002-03, it had exceeded Rs. 3 crores and, therefore, they were not entitled for the benefit of exemption under Notification No. 8/2003 and could not have cleared the containers for jelly packing at nil rate of duty by availing the benefit under Notification No. 67/95-CE, it was observed that during the period April 2003 to December 2003 the respondents had cleared 16411000 nos. of plastic containers valued at Rs. 26,25,760/- @ Rs. 0.16 per container, on the basis of the Chartered Accountant certificate dated 6.04.2001 submitted by the respondents. Consequently, the show cause notice dated 28.04.2004 came to be issued which was contested by the respondents under reply dated 14.07.2004. The adjudicating authority by order dated 31.08.2004 confirmed the demand of duty to the tune of Rs.462134/- with interest and penalty of Rs. 10,000/-. While confirming the said duty, the adjudicating authority observed that the product in question was marketable and hence excisable. Being aggrieved by the said order, the respondents carried the matter in appeal before the Commissioner (Appeals), Indore and by the impugned order, the said order of the adjudicating authority has been set aside. While setting aside the order of the adjudicating authority, the learned Commissioner (Appeals) held that the department failed to produce evidence about the marketability of the product and that the samples of the containers submitted for perusal of the Commissioner

(Appeals) disclose that the containers could not be normally brought into market for sale and there was no use of the containers except for the manufacturers like appellant to fill the same with jelly or other liquid. The Commissioner (Appeals) also refers to another matter of the respondents themselves in relation to the same product relating to earlier period which was decided in favour of the revenue -- department, however, did not give credence of the said order on the ground of absence of evidence on record on the issue of marketability in the matter in hand.

4. We have heard the DR for the appellant and learned Advocate for the respondents. The DR has also submitted that the earlier order by the Commissioner (Appeals) was challenged by the respondent before the Tribunal without any success and demand against respondents was confirmed in the matter of **M/s S.K. Industries Pvt. Limited vs. Commissioner of Central Excise, Gwalior** reported in 2006 (200) ELT 565 (Tri. Del.). The learned Advocate for the respondents on the other hand submitted that irrespective of the earlier proceedings fact remains that in the case in hand the department had failed to produce any evidence on the point of marketability of the product and, therefore, taking into consideration the settled law that in the absence of marketability, the product cannot be classified as excisable goods, no fault can be found with the impugned order.

5. Once, it is evidently clear from the records that for the earlier period in relation to the respondents own case and pertaining to the same product the adjudicating authority had held the product to be marketable and, therefore, excisable and the same was confirmed by the Commissioner

(Appeals). It was not permissible for the Commissioner (Appeals) to take a different view for the subsequent period in the absence of any additional material being placed on record to support such different view. Undisputedly, there was no additional material available on record to take a view different from the one taken in the earlier proceedings in relation to the earlier period regarding the same product and the same parties. It is also pertinent to note that the order passed by the Commissioner (Appeals) in the earlier proceedings was subsequently confirmed by the Tribunal.

6. Besides, the findings arrived at by the Commissioner (Appeals) himself are self contradictory. On one hand, the Commissioner (Appeals) has observed that there are no materials on record to establish the marketability of the product and at the same time the Commissioner (Appeals) has held that the product in question is "of no use except for manufacturers like appellants to fill the same with jelly or any other liquid". The said finding clearly disclose the marketability aspect of the product.

7. For the reasons stated above, therefore, the impugned order cannot be sustained and is liable to be set aside and the order passed by the adjudicating authority is confirmed. Accordingly, appeal succeeds, the impugned order is set aside and the order passed by the adjudicating authority is confirmed with consequential relief.

(Justice R.M.S. Khandeparkar)
President

(Rakesh Kumar)
Member (Technical)

Pant