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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 **29/03/2011**

Appeal No. E/17 /2005-23 /2005 & E/292/2006- EX[DB]

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

To :
M/S XEN,CENTRAL WORKSHOP
P.S.E.B.VERKA AMRITSAR — Appellant

Vs

M/S XEN,CENTRAL WORKSHOP

C.C.E. JALLANDHAR(HQ. AT CHANDIGARH) — Respondent

I am directed to transmit herewith a certified copy of **Final order No. 310-317/ 2011 EX[DB]** dated 16-3-11 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. JALLANDHAR(HQ. AT CHANDIGARH)
C.R.BUILDING, PLOT NO. 19,
SECTOR 17-C, CHANDIGARH.

2. Adv. / Consult
MR.K.K ANAND
A-5,BASEMENT,LAJPAT NAGAR-III NEW DELHI-24

3. C.D.R
4. Bar association, CESTAT, New Delhi
5. Director Publications, Customs, Excise, I.P. Estate, New Delhi
6. M/s Centax Publictions 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 (Haryana)
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.
16. SH. VIKRANT KACKRIA, ADV.,
509, SECTOR-7, PANCHKULA (HR)

Assistant Regis
(Excise Appeal Bran

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
West Block No.2, R. K. Puram, New Delhi
COURT-I

Date of hearing/decision: 16.03.2011

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?	Seen
4	Whether Order is to be circulated to the Departmental authorities?	Yes

Excise Appeal Nos. 17 to 23 of 2005

[Arising out of common Order in Appeal No. 423-429-CE/JAL/2004 dated 28.09.2004 passed by the Commissioner of Central Excise (Appeals), Jalandhar, Chandigarh].

M/s XEN Central Workshop, PSEB — Appellants

Vs.

CCE, Jalandhar — Respondent

AND

Excise Appeal No. 292 of 2006

[Arising out of Order in Appeal No. 231/CE/APPL/JAL/2005 dated 31.05.2005 passed by the Commissioner (Appeals) Central Excise, Jalandhar, Chandigarh].

M/s XEN Central Workshop, PSEB — Appellants

Vs.

CCE, Jalandhar — Respondent

Appearance:

Appeared for the Appellants – Shri Saurabh Yadav, Advocate junior of Sh. K.K. Anand, Advocate and Sh. Vikrant Kackria, Advocate in E/A No. 292 of 2006

Appeared for the Respondent –Shri R.K. Verma, DR

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

FINAL Oral Order No. 310 - 317 / 2011-EX.

Per Shri Justice R.M.S. Khandeparkar:

Heard the learned Advocate for the appellants and DR for the respondent.

2. These appeals arise from the orders passed by the Commissioner (Appeals) rejecting the appeals file by the appellants against the orders passed by the original authority dismissing the claim for refund. The orders sought to be challenged are order dated 13.08.2005 and dated 28.09.2004 passed by the Commissioner (Appeals), Jalandhar. By the said orders the original orders dated 28.02.2005 and 15.06.2004 have been dismissed.

3. The refund claim filed by the appellants has been rejected on four counts, namely that the claim of the appellants that the product was non-dutiable was not correct, the appellants were not entitled for exemption under Notification No. 74/93-CE dated 28.02.1993, the appellants had not discharged the burden of proof in relation to non passing of the burden of duty upon the customer and fourthly the claim being time barred. The impugned order is essentially challenged on the ground that the authorities

erred in holding that there was finalization of provisional assessment. However, to the specific query from the learned Advocate for the appellants as to what part of the record would disclose the assessment was provisional, nothing was pointed out to us from the record and on the contrary the DR referring to the copy of the letter received by their office from the concerned Commissionerate submitted that the assessment for the period 1994-95 was finalized in July 1995, for the period from 1995-96 in October, 1996, for the period from 1996-97 in August 1998, for the period from 1997-98 in August in 1998, for the period from 1998-99 and 1999-2000 in October 2003. Even assuming that the contention sought to be raised on behalf of the appellants is correct and the assessment were not finalized, obviously, it means that the applications for refund by the appellants were pre-mature and, therefore, were not maintainable. However, as the records disclose that the assessments were finalized, the matter stands fully covered by the decision of the Apex Court in the matter of **CCE, Kanpur** vs. **Flock (India) Pvt. Ltd.** reported in 2000 (120) ELT 285 (S.C.). It was clearly ruled therein as under:-

> "**10.**Coming to the question that is raised there is little scope for doubt that in a case where an adjudicating authority has passed an order which is appealable under the statute and the party aggrieved did not choose to exercise the statutory right of filing an appeal, it is not open to the party to question the correctness of the order of the adjudicating authority subsequently by filing a claim for refund on the ground that the adjudicating authority had committed an error in passing his order. If this position is accepted then the provisions for adjudication in the Act and the Rules, the provision for appeal in the Act and the Rules will lose their relevance and the entire exercise will be rendered redundant. This position in our view, will run counter to the scheme of the Act and will introduce an element of uncertainty in the entire process of levy and collection of excise duty. Such a position cannot, be countenanced. The view taken by us also gain support from the provision in sub-rule (3) of Rule 11 wherein it is laid

down that where as a result of any order passed in appeal or revision under the Act, refund of any duty becomes due to any person, the proper officer, may refund, the amount to such person without his having to make any claim in that behalf. The provision indicates the importance attached to an order of the appellate or revisional authority under the Act therefore, an order which is appealable under the Act is not challenged then the order is not liable to be questioned and the matter is not to be reopened in a proceeding for refund which if we may term it so is in the nature of execution of a decree/order. In the case at hand it was specifically mentioned in the order of the Assistant Collector that the assessee may file appeal against the order before the Collector (Appeals) if so advised."

4. If it was the case of the appellants that the process undertaken by the appellants did not amount to manufacture and, therefore, the product was not dutiable, it was necessary for the appellants to raise the said issue in an appropriate proceedings and not in the miscellaneous proceedings like the refund proceedings. The issue regarding the dutiability of the product on account of the process being manufacture or not within the meaning of the said expression under the said Act cannot be subject matter of adjudication in a miscellaneous proceeding. The refund proceedings are nothing but miscellaneous proceedings which are in the form of execution prosecution of a decree of a Civil Court. ~~The~~ Such an issue is always to be adjudicated upon in the main proceedings. This is being settled law, it was not permissible for the appellants to raise in the refund proceedings the issue of non-dutiability of the product on the ground that the process did not amount to manufacture. Law in this regard is well settled by the decision of the Apex Court in Flock (India) Pvt. Limited (supra).

5. The next ground of challenge relates to the claim of exemption benefit under Notification No. 74/93-CE dated 28.02.1993. Undisputedly, apart from claiming that the appellants is a factory belonging to the State

Government, no other facts which are necessary to bring the case within the four corners of the exemption notification have either been pleaded or proved in the matter. The proviso to the said notification clearly states that "provided that such goods are manufactured by a factory belonging to a State Government and such goods are intended for use by any Department of that Government". Nothing has been pointed out to us which could reveal from the records that the goods manufactured by the appellants were intended to be used by any of the Department of the concerned State Government.

6. Besides, undisputedly the provision of law comprised under Rules 73B as was in force at the relevant time clearly required the appellants to file classification list and the declaration in case of claim of exemption under any notification to specify the same. It is undisputed and also apparent from the record placed before us that though the appellants had filed classification list, they did not file necessary declaration claiming benefit of the notification. Undisputedly, the notification was an exemption notification. It was not a blanket exemption. It was subjected to certain conditions. When any condition is attached to an exemption notification, it has to be strictly complied with. The department is entitled to verify the compliance of such condition. It is, therefore, necessary to claim the benefit under notification sufficiently prior to the period for which the exemption is sought to be claimed and not after the expiry of the period. It is sought to be contended that in reply to the show cause notice, the appellants had submitted that the product manufactured by them was captively consumed

and in that connection attention was drawn to the relevant statement in the reply to the show cause notice. The said statement reads thus:-

> "It is submitted that items fabricated are not to be sold in the course of wholesale trade but are used entirely for captive consumption. The material fabricated in our workshop are issued to the Central Stores of PSEB under duty paid invoice from where they are further issued to operation divisions in numbers only".

The statement nowhere discloses that the disbursement of the product to the Central Stores of PSEB and further that to the operation divisions was essentially meant for the use by the department itself. It is not mere supply of the goods that is sufficient but it is also necessary to show that they are to be used by particular department of the respective Government. There are not even averments in that regard in the reply. However, even assuming that such a statement was available in the reply to the show cause notice, it would not amount to compliance of the conditions to the notification. As already stated above, the necessary declaration in that regard has to be filed in advance so that there is opportunity to the Revenue department to have proper check in that regard. The statement in the show cause notice after initiation of action cannot amount to sufficient opportunity to the Revenue Department to have proper check over the activities which were already completed in past by the assessee. Such a defence which is sought to be raised for the first time in response to the show cause notice cannot amount to compliance of the requirement of the conditions to the exemption notification.

7. As regards the applicability of the principle of unjust enrichment, it is settled law that the burden in that regard squarely lies upon the assessee. Undisputedly, apart from tall claim in that regard in the reply to the show cause notice, the appellants did not produce any material on record in

support of such claim. Attention was sought to be drawn in that regard to the balance sheet. However, balance sheet does not disclose whether the burden in relation to the duty paid on each of the invoices was actually transferred to the ultimate consumer or not.

8. Considering the view that we are taking in the matter on the above mentioned issues, we do not consider it necessary to deal with the issue of bar of limitation.

9. For the reasons stated above, therefore, the appeals fail and are hereby dismissed.

(Justice R.M.S. Khandeparkar)
President

(Rakesh Kumar)
Member (Technical)

/Pant/