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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/2717-2718/2010 - EX[DB] WITH E/S/2460-2461/2010-SX Date **04/05/2011**

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

To :
M/S J. K. CEMENT WORKS,

NIMBAHERA ,
DISTRICT:- CHITTORGARH, (RAJASTHAN) Appellant
M/S J. K. CEMENT WORKS,
Vs
STAY ORDER NO. 498-499/2011-EX Respondent
C.C.E. JAIPUR II

I am directed to transmit herewith a certified copy of **Final order No.**370-371/ **2011 EX[DB]** dated 08-4-11 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. JAIPUR II
N.C.R.BUILDING, STATUE
CIRCLE, "C" SCHEME, JAIPUR
302005.

2. Adv. / Consult
MR.ASHOK SAGAR ADVOCATE(KACHWAHA & PARTNERS)
1/6, SHANTI NIKETAN, NEW DELHI-110021.

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. Taxmann Allied Service Pvt Ltd., 59/32, New Rohtak Road, New Delhi - 110005
9. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall.Above Star India Bazar,Satellite Road, Ahmedabad-15
10. LAWCRUX Advisors Pvt Ltd. LAW House,1-8,Sector - 10. Faridabad 121003 (Haryana)
11. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road. Vasant Kunj, New Delhi - 110070
12. Office Copy
13. Guard file
14. HON'BLE PRESIDENT.
15. M/S. J.K. CEMENT LTD, GHALIB INSTITUTE, MATA SUNDARI LANE, N. DELHI - 2

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI PRINCIPAL BENCH, COURT NO. I

Excise Stay Application Nos. 2460-2461 /2010
Excise Appeal Nos. 2717 -2718 /2010

M/s. J.K. Cement Works Appellants

Vs.

Commissioner of Central Excise Respondent
Jaipur II

Appearance:

Shri Ashok Sagar, Advocate for the Appellants
Shri S.R. Meena, DR for the Respondent

CORAM:

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

Date of Hearing/decision : 8.4.2011

STAY **ORDER** 498-499 /2011-EX

Per Shri Justice R.M.S. Khandeparkar (for the Bench):

As we propose to dispose of the appeals themselves, and hence the applications are allowed without insisting for any deposit, while directing the Registry to place the appeals for hearing forthwith.

(Justice R.M.S. Khandeparkar)
President

(Rakesh Kumar)
Member(Technical)

ss

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI PRINCIPAL BENCH, COURT NO. 1

Excise Appeal Nos. 2717 -2718 /2010

[Arising out of Order-in-Appeal No. 235 & 236(KKG)CE/JPR-II/ 2010 dated 30.4.2010 passed by Commissioner of Central Excise (Appeals), Jaipur II]

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?	:	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

M/s. J.K. Cement Works — Appellants

Vs.

Commissioner of Central Excise
Jaipur II — Respondent

Appearance:

Shri Ashok Sagar, Advocate for the Appellants
Shri S.R. Meena, DR for the Respondent

CORAM:

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

Date of Hearing/decision : 8.4.2011

FINAL **ORDER** 370-371/2011-EX

Per Shri Justice R.M.S. Khandeparkar (for the Bench):

These appeals were heard in terms of order passed today in Stay application Nos. 2460-61/10. The appeals arise from order dated 30.4.2010 passed by the Commissioner (Appeals), Jaipur. By the impugned order the Commissioner (Appeals) has set aside the order passed by the adjudicating authority. The Assistant Commissioner Chittorgarh by his order dated 22.12.08 held that the refund which was granted to the appellants by the Assistant Commissioner by his order dated 23.5.03 was correctly granted and refunded to the appellants.

2. The appellants are the manufacturers of grey cement. During the period 1986-87, there was substantial increase in the demand for cement in the country. The Central Government announced various incentives for the manufacturers of the cement to encourage the increase in manufacturing capacity of the cement industry in the country. Under one of such scheme, consequent to the expansion of the industry the manufacturer was entitled to claim certain rebate in terms of notification No. 36/87-CE dated 1.3.87. Pursuant to the claim in that regard by the appellants, the same came to be allowed under order dated 23.5.03. However, on account of dispute relating to applicability of principles of unjust enrichment various matters travelled up to the stage of proceedings before the Apex Court. Consequently, the Apex court in the matter of Commisisoner of Central Excise, Jaipur vs. Birla Corpn. Ltd. and another, reported in [2007 (3) SCC 68] and connected matters including that of the appellants, held that in such cases condition of applicability of principles of unjust enrichment cannot be disputed. However, while applying the said principle, it is necessary for the authorities to deal with the issue as to whether the duty element has been

passed on to the customers or not by the manufacturers. In fact para 8 of the said decision reads thus:

> "8. But the crucial question is whether the duty element had been passed on to the customer. This is to be factually adjudicated. We, therefore, remand the matter to the Assistant Collector to decide this matter. The parties shall be permitted to place materials in support of their respective stand. We make it clear that we have not expressed any opinion as to the effect of the adjudication to be made by the Assistant Collector in the proceedings before AAIFR."

3. In terms of the said decision of the Supreme Court, the matters came to be remanded and in case of the appellants' matter, when the same was taken up for hearing by the Assistant Commissioner, Chittorgarh, the appellants raised two points, firstly non-applicability of the principle of unjust enrichment in view of the said notification in question and secondly in any case the appellants had not passed over the duty burden to the consumers. The Assistant Commissioner by its order dated 22.12.08 answered the first point in favour of the appellants, while the second point was answered against the appellants. Being aggrieved with the said decision, the department preferred the appeal before the Commissioner (Appeals), Jaipur. The appellants on the other hand, filed cross objections in relation to the finding on the second issue which was against the appellants. The Commissioner (Appeals) by the impugned order allowed the appeal filed by the department holding that the issue of applicability of principles of unjust enrichment was beyond the scope of adjudication by the Assistant Commissioner in view of the remand order passed by the Apex Court. However, the Commissioner (Appeals) refused to deal with the cross objections on the ground that the

appellants did not file any appeal against the part of the order of the adjudicating authority which was against the appellants.

4. By the present appeal both the findings are sought to be challenged by the appellants.

5. Perusal of the order passed by the Supreme Court and particularly para 8 thereof clearly discloses that the remand order dealt with two aspects, one regarding passing over of the duty element to the customers and second that non-expression of any opinion by the Apex Court in relation to the fact of adjudication to be made by the Assistant Commissioner in proceedings before AAIFR. It apparently discloses that in case of refund claim, the adjudication therefore was restricted to the issue as to whether the duty element had been passed over to the customers or not. No other point was subject matter of remand proceedings. Certainly, therefore, the adjudicating authority could not have considered the issue as to whether the principle of unjust enrichment was attracted or not in terms of said notification. In fact, the remand order itself discloses that the matter was remanded only to deal with the issue as to whether the duty element had been passed over to the customers or not. Such a question can arise essentially on application of principles of unjust enrichment. In other words, by the very direction of the Supreme Court, the authority was required to decide as to whether the duty element had been passed over to the customers or not because of applicability of the principle of unjust enrichment. The Supreme Court thus had already held that the principle of unjust enrichment was attracted in case in hand. In view of the said decision, it was not open for the lower authorities to deal with the said issue. Being so, as far as first

aspect of the impugned order is concerned, it has to be set aside. The decision of the lower authority about non-applicability of the principles of unjust enrichment cannot be sustained. Hence no case is made out for interference in the lower appellate authority's order setting aside the said finding of the adjudicating authority.

6. As regards the second point which relates to non-consideration of the cross objections are concerned, certainly it was highly improper for the Commissioner (Appeals) to ignore the cross objections filed in that regard by the appellants and that too solely on the ground that appellants had not filed the appeal against the findings in that regard by the lower authority. Once, that the department has filed the appeal against the order of the lower authority, obviously, the lower appellate authority could have certainly gone into the cross objection filed by the appellants in the same appeal. It was not the case of the department that such cross objections were filed beyond the period of limitation.

7. In the facts and circumstances, therefore, the impugned order to the extent it refuses to consider the cross objection in relation to the point as to whether the duty element had been passed on to the customers cannot be sustained and is liable to be set aside.

8. The appeal therefore, partly succeeds. The decision of the lower appellate authority in relation to applicability of principles of unjust enrichment cannot be found fault with. However, the decision relating to refusal to consider the cross objection on the point as to whether the duty element had been passed over to the customers or not cannot be sustained and is hereby set aside and the matter is remanded to the Commissioner (Appeals) to deal with the said issue namely, as to

whether the duty element had been passed over to the customers by the appellants or not.

9. The Appeals accordingly stand disposed of.

(Justice R.M.S. Khandeparkar)
President

(Rakesh Kumar)
Member(Technical)

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