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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/2675/2005 - EX[DB] Date **03/06/2011**

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

To :
C.C.E. MEERUT II

OPP. SAHEED PARK (NEAR ASHOK KI LAT) DELHI
ROAD, MEERUT (UP)

C.C.E. MEERUT II Appellant

Vs

M/S INDIAN TONERS & DEVELOPERS LTD. Respondent

I am directed to transmit herewith a certified copy of **Final order No.449/ 2011 EX[DB]** dated 06-4-11 passed by the Tribunal under **Section 35-C(1)of Central Excises Act, 1944**

Assistant Registrar
(Excise Appeal Branch)

Copy to :

1. Respondent
M/S INDIAN TONERS & DEVELOPERS LTD.
10TH,K.M.STONE BAREILY ROAD
RAMPUR

2. Adv. / Consult SH. K.J. SINGH, ADV,
C/O RESPONDENT

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.

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 : 06/04/2011.
DATE OF DECISION : 06/04/2011.

Excise Appeal No. 2675 of 2005

[Arising out of the Order-in-Appeal No. 89-CE/MRT-II/2005 dated 18/05/2005 passed by The Commissioner (Appeals), Customs & Central Excise, Meerut-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 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

CCE, Meerut – II — Appellants

Versus

M/s Indian Toners & Developers Ltd. — Respondent

Appearance

Shri Sunil Kumar, Authorized Representative (DR) – for the Appellants.

Shri K.J. Singh, Advocate – for the Respondent.

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

Final Order No. 449/2011-Ex. Dated : ____________

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

Heard DR for the appellants and learned advocate for the respondent. This appeal arises from order dated 18th May 2005 passed by Commissioner (Appeals), Meerut. By the impugned order the appeal filed by the department against the order of the original authority has been dismissed solely on the ground of bar of limitation.

2. It has been held by the Commissioner (Appeals) that the assessment memorandum by the Adjudicating Authority was dated 24th September 2002 and date on which order under sub-section (2) of Section 35E of the Central Excise Act, 1944 was passed was 14th November 2003 which was beyond the period of one year prescribed under Section 35E (3) and hence the appeal is barred by the limitation.

3. While assailing the impugned order it is sought to be contended on behalf of the department that the Commissioner (Appeals) erred in considering the date of 14th November 2003 to be the date of order of review when in fact it was the date on which the review order was communicated for taking necessary steps to file the appeal. According to the department, the assessment order was passed on 24/9/02 which was reviewed by the Commissioner on 22nd September 2003 which was well within the period prescribed under Section 35 E (2) and communicated to the department on 14th of November 2003 and consequently

the appeal was filed on 25th November 2003. It was also submitted on behalf of the department that the facts stated in the memo of appeal are verified by the Commissioner as true and correct.

4. On the other hand learned advocate for the respondent submitted that apart from making a statement in the memo of appeal to the effect that the order of the Assistant Commissioner was reviewed by the Commissioner by its order dated 22nd September 2003 and though it is stated that the attested copy of the note sheet has been annexed to the appeal memo, no such annexure was filed with the appeal and even a copy thereof was not furnished to the respondent.

5. It cannot be disputed that no copy of any note sheet has been filed alongwith the appeal, however, that would not make difference in the matter in hand wherein the facts are very clear which are verified by the Commissioner in the verification clause as well as the impugned order does not disclose the date of review order as such even though it was to the knowledge of the Commissioner (Appeals) that the appeal has been filed pursuant to the exercise undergone as required under Section 35E (2) readwith sub-Section (3) thereof.

6. Section 35E (2) as was enforced at the relevant time provided thus :

> "The [Commissioner of Central Excise] may, of his own motion, call for and examine the record of any proceeding

in which an adjudicating authority subordinate to him has passed any decision or order under this Act for the purpose of satisfying himself as to the legality or propriety of any such decision or order and may, by order, direct such authority to apply to the [Commissioner (Appeals)] for the determination of such points arising out of the decision or order as may be specified by the [Commissioner of Central Excise] in his order."

7. Once such a decision is taken by the Commissioner any exercise of powers under the above quoted provision of law the appeal thereafter has to be filed within three months from the date of communication of such order. This is apparent from sub-section (4) of Section 35E which read thus :

> "Where in pursuance of an order under sub-section (1) or sub-section (2) the adjudicating authority or the authorised officer makes an application to the Appellate Tribunal or the [Commissioner (Appeals)] within a period of three months from the date of communication of the order under sub-section (1) or sub-section (2) to the adjudicating authority, such application shall be heard by the Appellate Tribunal or the [Commissioner (Appeals)], as the case may be, as if such application were an appeal made against the decision or order of the adjudicating authority and the provisions of this Act regarding appeals, including the provisions of sub-section (4) of section 35B shall, so far as may be, apply to such application."

8. Bare perusal of the impugned order discloses that even though the Commissioner (Appeals) was aware of the fact that the appeal has been filed in terms of the provisions of law

comprised under Section 35E (2) readwith sub-section (4) thereof he failed to take note of the fact that the date of 14th November 2003 was not the date of order of review but it was the date of communication of the order of review and that the department had three months time to file the appeal from such date. In the background of these facts, certainly the impugned order cannot be sustained and is liable to be set aside while holding that the appeal was filed within the period of limitation and therefore it was necessary for the Commissioner (Appeals) to deal with the same on merits in accordance with provision of law. Accordingly, the appeal succeeds. The impugned order is set aside and the matter is remanded to the Commissioner (Appeals) to decide the same on merits in accordance with provision of law.

(Justice R.M.S. Khandeparkar)
President

(Rakesh Kumar)
Member (Technical)

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