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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/1297/2011 - EX[DB] WITH E/S/1665/2011-EX Date **19/12/2011**

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

To :
M/S VIVEK PHARMA CHENM (I) LIMITED,

EPIP SIDCO INDUSTRIAL COMPLEX, BARI
BRAHAMANA JAMMU (J&K)

M/S VIVEK PHARMA CHENM (I) LIMITED, Appellant

Vs

C.C.E. JAMMU **STAY ORDER NO. 1559/2011-EX** Respondent

I am directed to transmit herewith a certified copy of **Final order No.1052/ 2011 EX[DB]** dated 09-12-11 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. JAMMU
OB-32, RAIL HEAD COMPLEX,
JAMMU - 180012.

2. Adv. / Consult
MR.RAM NARAIN & GAUTAM CHUGH, ADV
S.C.F.,13-A, A BLOCK MARKET, NEAR MATA PRAVATI DEVI HOSPITAL
RANJIT AVENUE, AMRITSAR (PB)

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

Assistant Registrar
(Excise Appeal Branch)

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

Excise Appeal No. 1297 of 2011
Excise Stay Application No. 1665 of 2011

[Arising out of Order-in-Appeal No. 45/CE/Chd-I(J&K)/2011 dated 17.3.2011 passed by the Commissioner of Central Excise, Chandigarh]

For approval and signature:

Hon'ble Ms. Archana Wadhwa, Member (Judicial)
Hon'ble Mr. Mathew John, Member (Technical)

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1. Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982? : No
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

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M/s. Vivek Pharma Chem (India) Ltd.. Appellants

Vs.

Commissioner of Central Excise Jammu Respondent

Appearance:
Shri Gautam Chugh, Advocate for the Appellants
Shri I. Baig, SDR for the Respondent

CORAM:
Hon'ble Ms. Archana Wadhwa, Member (Judicial)
Hon'ble Mr. Mathew John, Member (Technical)

Date of Hearing /decision: 24.11.2011

STAY ORAL ORDER No. 1559/2011-EX

FINAL **ORAL ORDER NO.** 1052/2011-EX

Per Archana Wadhwa (for the Bench):

As the appellants have deposited the entire duty of Rs.1,73,204/-, we dispense with the condition of pre-deposit of penalty and proceed to decide the appeal itself inasmuch as a ~~the~~ short issue is involved.

2. The appellants is a unit situated in the area of Jammu and Kashmir and were availing the benefit under Notification No. 56/02. In terms of the said notification, the duty is first required to be paid by a manufacturing unit, which stands automatically abated as refund in the subsequent months. The dispute in the present appeal relates as to whether the Education Cess and secondary and higher Education Cess would get covered under the said notification so as to result in automatic refund to the assessee.

3. Lower authorities by holding that such notification does not cover Education Cess and higher and secondary Education Cess, denied the benefit of notification to the appellants. Accordingly, duty ~~it~~ stands confirmed against them along with imposition of penalty.

4. Learned advocate appearing for the appellants draws our attention to Single Member Bench order of the Tribunal in Bharat Box vs. CCE 2007 (214) ELT 534 (Tri-Del) laying down that Education Cess would be covered by notification No. 56/2002. He however, fairly agrees that said decision was over-ruled by the Division Bench of the Tribunal in

the case of CCE Jammu vs. Jindal Drugs Ltd. reported as [2011 (267) ELT 653 (Tri-Del). As such, he submits that he, in view of the law declared in the said judgment, is not contesting the confirmation of demand against them. The only challenge in the present appeal is for imposition of penalty of identical amount in terms of Section 11AC of the Act. Learned Advocate submits that during the relevant period i.e. January, 2008 to April, 2008, declaration of law by the Tribunal was in favour of the assessee. It was only subsequently in 2009 that the earlier order of the Tribunal was over-ruled by Division Bench and it was held that the assessee located in the area of Jammu and Kashmir would not get the benefit of notification No. 56/2002 in respect of Education Cess and secondary and Higher Education Cess. As such, he submits that no malafide can be attribut~~able~~ed to the appellants in availing the said cess, inasmuch as the law was in their favour during the relevant period. For the above proposition, he placed reliance on the Tribunal decision in the case of Shobha Digital Lab vs. CCE, Bhopal [2011 (24) STR 430 (Tri-Del)] laying down that when there are divergent views of the higher authorities on the issue and assessees act on the basis of said views, therefore cannot be held ~~him~~ guilty for malafide breach.

5. Learned DR leaves the matter to the discretion of the Bench. Admittedly, at the relevant time law declared was in favour of the appellants and there are no contra judgement holding to the contrary. As such, we are not inclined to impose any penalty on the appellants.

& interest, if any,

The same is accordingly, set aside. Demand however, is confirmed as not challenged by the appellants.

6. Stay petition as also appeal gets disposed of in the above manner.

(Pronounced in the open Court)

(Archana Wadhwa)
Member(Judicial)

(Mathew John)
Member(Technical)

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