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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/1338/2005-EX[DB]

Dated: **03/10/2012**

Assistant Registrar
C.E.S.T.A.T. New Delhi
To,
KHEMKA CONTAINERS LTD.
Plot No 138 Sector-24 Faridabad

(Appellant)

KHEMKA CONTAINERS LTD.

VS

(Respondent)

C.C.E. DELHI IV

I am directed to transmit herewith a certified copy of Final Order No. **A/1180/2012-EX[DB]** dated **26/09/2012** passed by the Tribunal under section **35-C(1) of the Central Excise and Salt Act, 1944.**

Assistant Registrar
EXCISE Appeal Branch

Copy To,
1. Respondent
C.C.E. DELHI IV
New CGO Complex, NH-IV, Faridabad,
Haryana 121001.

2. **Advocate(s) / Consultant(s):** SH. B.L. NARSIMHAN, ADV., B-6/10, S.J. ENCLAVE, N. DELHI-29

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-3

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. Mark Professional Services Pvt. Ltd., 108, Everest Block, Aditya Enclave, Ameer Pet, Hyderabad – 500038

13. Office Copy

14. Gaurd File

Assistant Registrar
EXCISE Appeal Branch

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI, PRINCIPAL BENCH, NEW DELHI.

Date of hearing:23.07.2012
Date of Decision: 26/9/2012

1.	Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982.	
2	Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	
3	Whether Their Lordships wish to see the fair copy of the Order?	
4	Whether Order is to be circulated to the Departmental authorities?	

Excise Appeal No.E/1338 of 2005

(Arising out of Order-in-Original No.61/RH/Adj./2004-2005 dated 2.3.2005 of the Commissioner of Central Excise, Delhi-IV).

M/s. Khemka Containers Ltd. ...Appellant

Vs.

CCE, Delhi-IV, Faridabad ...Respondent

Coram : Hon'ble Justice Shri Ajit Bharihoke, President
Hon'ble Shri Rakesh Kumar, Member (Technical)

Appearance: Shri B.L. Narsimhan, Advocate for the appellant.
Shri I. Beg, DR for the respondent.

FINAL Order No. A/1180/2012-EX(BR)

Per Rakesh Kumar:

The appellant manufacture corrugated boxes, containers, cases and other corrugated articles chargeable to central excise duty under Heading No.4819 of the Central Excise Tariff. For manufacture of corrugated packing material and trays, they require corrugation gum which is made within the factory by mixing starch, borex and caustic soda in certain proportion. This corrugation gum is mixed with the aid of power. The department found that certain quantity of the corrugation gum made in the factory is used within the factory in the manufacture of corrugated boxes, cartons and other articles cleared at nil rate of duty. Since the department was of the view that corrugation gum is an excisable item, attracting central excise duty, in respect of the quantity of the corrugation gum which is captively used in the manufacture of corrugated boxes, cartons and other articles cleared at nil rate of duty, exemption notification no.67/95-CE dated 16.3.1995 would not be applicable. On this basis a show cause notice dated 29.05. 2001 was issued for demand of duty amounting to Rs.8,43,315/- on the clearances of corrugation gum during the period from May, 1996 to Feb., 2001 for captive consumption. This show cause notice was issued by invoking extended period under proviso to Section 11 A(1) of the Act and besides recovery of interest on duty, also sought imposition of penalty on the appellant under Section 11 AC of the Act.

2. The show cause notice was adjudicated by the Commissioner vide order-in-original dated 2.3.2005 by which the Commissioner holding that corrugation

gum is an excisable item and since certain quantity of corrugation gum cleared captively were used in the manufacture of exempted corrugated boxes/cartons, the same would be liable to duty, confirmed the duty demand of Rs.8,43,315/- along with interest and besides this, imposed penalty of equal amount on the appellant under Section 11 AC of the Central Excise Act. Against this order of the Commissioner, this appeal has been filed.

3. Heard both the sides.

4. Shri B.L. Narsimhan, Advocate, ld. Counsel for the appellant pleaded that corrugation gum obtained by mixing the borex, starch, caustic soda lye has no shelf-life, that it has to be continuously stirred, that the appellant do not add any chemicals to increase its shelf-life, that the unused corrugation gum is thrown away, that the corrugation gum in question, is not marketable and, hence, not excisable, that it is settled law if the department seeks to levy excise duty on some product on the ground that the same is marketable, the burden of proving its marketability is on the department, that statement of Shri V.S. Gupta of M/s. Sankla Chemicals and Shri Shushil Garodia of M/s. Progressive Packaging Industries stating that corrugation gum manufactured in their factories has shelf-life 3 to 4 days, cannot be applied to the corrugation gum being manufactured by the appellant as the ingredients of the corrugation gum in those factories would be different, that in terms of the Board's Circular No.51/89

dated 5.9.89 and 19/89 dated 28.3.89 , the corrugation gum cannot be treated as marketable and hence, cannot be treated as excisable, that bulk of the duty demand is time barred as there was no justification for invoking longer limitation period under proviso to Section 11 A(1) of the Central Excise Act, 19444, that for the same reason, neither interest on duty under Section 11 AB nor penalty on the appellant under Section 11 AC would be applicable and that in view of this, the impugned order is not correct.

5. Shri I. Baig, the Departmental Representative, defended the impugned order by reiterating the findings of the Commissioner in it and emphasized that corrugation gum made by the appellant has shelf-life which is clear from the statement of two persons, Shri V.S. Gupta of M/s. Sankla Chemicals and Shri Sushil Garodia of M/s. Progressive Packaging Industries, that since the corrugation gum has shelf-life, the same would be excisable, that for determining marketability, the evidence of actual sale of the goods is not relevant, that corrugation gum is a product known to the market, that in view of this, the Commissioner has correctly treated this product as excisable and has confirmed the duty demand in respect of the same and that since the appellant are guilty of suppressing the relevant facts with regard to the manufacture of corrugation gum and its captive use in the manufacture of exempted final products, the extended period under proviso to Section 11A(1) has been correctly invoked and the interest on this duty under Section 11AB

and penalty under Section 11 AC has been correctly imposed, He, therefore, pleaded that there is no infirmity in the impugned order.

6. We have carefully considered the submissions from both the sides and perused the records. The corrugation gum, in question, is made by mixing starch and borex with caustic soda in certain proportion and the same is used captively in the manufacture of corrugated packing material and trays. The duty demand is in respect of only that the quantity of corrugation gum, which has been used in the manufacture of exempted corrugated boxes/cartons and other articles and in respect of this quantity of corrugation gum the department's view is that the same is excisable and having been used in the manufacture of fully exempted final products, the same would not be eligible for exemption under notification no.67/95-CE. In this regard, key question is ~~that~~ as to whether the corrugation gum, in question, has shelf-life. The appellant's plea is that since they make corrugation gum purely for captive consumption and not for sale, they do not add any chemical preservatives to increase its shelf-life and hence the corrugation gum made by them is not marketable and not excisable. The department simply relies upon the statements of Shri V.S. Gupta of M/s. Sankla Chemicals and Shri Sushil Garodia of M/s. Progressive Packaging Industries, according to whom, the corrugation gum made in those factories has shelf-life 3 to 4 days. However, the appellant's plea is that for increasing the shelf-life and making the corrugation gum marketable, some

chemicals have to be added and since the appellants are not adding any such chemicals, the corrugation gum made in their factory cannot be treated as marketable and hence, cannot be treated as excisable. We find that no chemical test of the corrugation gum has been done by the department to establish that the same was containing any preservatives or not. In absence of such chemical test report, merely on the basis of statements of employees of some other factories, it cannot be concluded that the corrugation gum manufactured in the appellant's factory also has shelf-life of 3 to 4 days and on this basis marketable. The burden of proving that a particular product produced by a manufacture is marketable is on the Department and the Department has not produced any evidence in support of this contention.

7. We, therefore, hold that the corrugation gum made by the appellant in their factory is not marketable and hence not excisable. The impugned order confirming the duty demand against the Appellant is, therefore, not sustainable. The same is set aside. The appeal is allowed.

[Order pronounced on 26/9/12.]

(Justice Ajit Bharihoke)
President

(Rakesh Kumar)
Member (Technical)

Ckp.