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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/2672/2005-EX[DB]

Dated: **01/10/2012**

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

KISAN SAHKARI CHINI MILLS LTD. (Respondent)

I am directed to transmit herewith a certified copy of Final Order No. **A/1186/2012-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
KISAN SAHKARI CHINI MILLS LTD.
Shekhupura DISTT Badaun

2. **Advocate(s) / Consultant(s):** SH. KAPIL VAISH, 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 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
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Assistant Registrar
EXCISE Appeal Branch

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

Date of hearing:17.07.2012
Date of Decision: 26/9/12

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/2672 of 2005

(Arising out of Order-in-Appeal No.74-75-CE/MRT-II/2005 dated 17.05.2005 of the Commissioner of Central Excise (Appeals), Meerut-II).

CCE, Meerut-II ...Appellant

Vs.

M/s. Kisan Sahkari Chini Mills Ltd. ...Respondent

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

Appearance: Shri R.K. Verma, DR for the appellant.
Shri Kapil Vaish, Chartered Accountant for the respondent.

FINAL Order No. A/1186/2012-EX(BR)

Per Rakesh Kumar:

The facts leading to this appeal are, in brief, as under:-

1.1 The respondents are manufacturers of sugar chargeable to central excise duty. The period of dispute in this case is from 1.5.1982 to 30.09.1982. During this period, the exemption notification no.132/82-CE dated 21.4.1982 as amended, provided for exemption from basic excise duty and special excise duty as mentioned in this notification in respect of sugar produced in a sugar factory during the period from 1.5.82 to 30.09.1982, which is in excess of the average production of the corresponding period of the preceding three sugar years. The quantum of exemption prescribed for freesale sugar was Rs.40 per quintal and quantum of exemption prescribed for levy sugar was 24.5 per quintal. The respondent submitted the rebate claim of amount of Rs.7,8 4395/- for the period from 1.5.1982 to 30.09.1982 in the office of the Superintendent on 29.10.1982, who, in turn, forwarded the same to the Asstt. Commissioner in June, 1983. The Assistant Commissioner received rebate claim application on 18.06.1983. In the meantime, the Asstt. Commissioner granted provisional rebate of Rs.4,50,000/- on 19.11.1984, but subsequently issued a show cause notice dated 13.05.85 to the respondent to show cause as to why the rebate claim filed by them should not be rejected as time barred. The rebate claim was rejected by the Asstt. Commissioner vide order dated 20.08.1985 as time barred. The respondent filed an appeal before the Commissioner (Appeals) against the Asstt. Commissioner . 20.08.1985 and the Commissioner (Appeals) vide order-in-appeal dated 07/08/91 remanded the matter to the Asstt. Commissioner directing that the date of refund should be treated as 29.10.1982, the date on which the same had been submitted to the Superintendent. The department filed an appeal before the Tribunal against the Commissioner (Appeals)'s order and the Tribunal vide Final Order dated 18.12.1995 rejected the Department's appeal. Thereafter the refund claim was examined de novo by the Asstt. Commissioner in pursuance of the Commissioner (Appeals)'s order upheld by the Tribunal. The Asstt. Commissioner after considering the angle of unjust enrichment held that the same is not hit by unjust enrichment but appropriated an amount of Rs.3,50,053/- towards outstanding demand and paid only an amount of Rs.29,342/- to the respondent. The rebate amount of Rs.3,34,395/- had been sanctioned by the Asstt. Commissioner after taking into account an advance rebate of Rs.4,50,000/- already granted to the respondent on 19.11.1984. Thus, the total amount sanctioned by the Asstt. Commissioner was Rs.7,84,395/-. Against this order of the Commissioner, while the respondent filed an appeal to the Commissioner (Appeals) against appropriation of an amount of Rs.3,50,053/- against outstanding demand, the department also filed review appeal on the ground that the Asstt. Commissioner's finding on the point of unjust enrichment is not correct and the refund is hit by the bar of unjust enrichment. The Commissioner (Appeals) vide order-in-appeal dated 17.5.2005 rejected both the appeals. Against this order of the Commissioner (Appeals), this appeal has been filed by the Revenue challenging the Commissioner (Appeals)'s order on the ground on unjust enrichment. The main ground of the Revenue's appeal is that while the Commissioner (Appeals) has relied upon the Larger Bench decision of the Tribunal in the case of **Kesar Enterprises Vs.CCE reported in 2000 (119) ELT 295 (LB-T),** the same is no longer a good law in view of the decision of the Apex Court in the case of Sahkari Khand Udyog Vs. CCE reported in 2005 (181) ELT 328 (SC). The department in this appeal has contended that the respondent had recovered full amount of duty from their customers and, therefore, the rebate is hit by the bar of unjust enrichment under Section 11B of the Central Excise Act.

2. Heard both the sides.

3. Shri R.K. Verma, ld. Departmental Representative assailed the impugned order by reiterating the grounds of appeal in the Revenue's

appeal and pleaded that in this case while the respondent had recovered the full amount of duty from their customers, and as such, the incidence of duty whose refund is being claimed by them, has not been borne by them, rebate is hit by bar of unjust enrichment, that the rebate available under notification no.132/82-CE is covered by the provisions of Section 11 B as it is nothing but refund of excess duty paid, that the issue involved in this case stands decided against the respondent by the Apex Court's judgement in the case of **Sahkari Khand Udyog Vs. CCE (supra)** which is with regard to the notification no. 108/78-CE similar to the notification no.132/82-CE, that the judgement of the Larger Bench of the Tribunal in the case of **Kesar Enterprises Vs. CCE (supra)** relied upon by the Commissioner (Appeals) is no longer a good law in view of the Apex Court's judgement in the case of **Sahkari Khand Udyog (supra)** and that in view of this, the impugned order is not correct.

4. Shri Kapil Vaish, Chartered Accountant, ld. Counsel for the respondent, defended the impugned order by reiterating the findings of the Commissioner (Appeals) in it and pleaded that the principle of unjust enrichment is not applicable to the rabate under notification no.132/82-CE dated 21.4.82, that this exemption notification confers the benefit of duty rebate for the sugar manufacturers for excess production of sugar during a period from May to

September which is a lean period for production of sugar, that the Larger Bench of the Tribunal in the case of **Kesar Enterprises Vs. CCE (supra)** in respect of the notification no.132/82-CE, which was also being availed by the respondent, has held that the principle of unjust enrichment will not apply to the rebate claim under this notification and that in view of this, there is no infirmity in the impugned order.

5. We have carefully considered the submissions from both the sides and perused the records.

6. Notification no.132/82-CE issued under Rule 8(1) of the Central Excise Rules, 1944 [corresponding to Section 5 A(1) of the Central Excise Act, 1944] provides for exemption from duty in respect of the excess production of sugar during the period from May, 1982 to September, 1982 to the extent as mentioned in this notification. The appellant during the period of dispute had paid duty on the clearances of sugar at the full rate and subsequently filed refund claim in respect of the quantum of excess production of sugar during May, 1982 to September, 1982 period. The point of dispute is as to whether this refund claim would be subject to the bar of unjust enrichment under Section 11 B. Though this refund claim pertains to the period from May, 1982 to September, 1982, since it had not been sanctioned till 19th Sept. 1991, the same would be subject to the provisions of sub-section (3) read

with Sub-section (2) of Section 11 B introduced w.e.f. 20.09.91. According to sub-section (3) of Section 11 (B) notwithstanding anything contrary contained in any judgement, decree, order or direction of appellate Tribunal or any court or any other provision of this Act or the rules made thereunder or any other law for the time being in force, no refund shall be made except as provided in sub-section (2). Sub-section (3) of Section 11 B is a non-obstante clause whose provisions shall have overriding effect. According to the sub-section (2) of Section 11(B) except for the exceptions (a) to (f) mentioned in the proviso to sub-section (2) of Section 11 B, in all other cases, the duty amount refundable shall be credited to the Consumer Welfare Fund. Rebate in respect of excess production of sugar during lean season in terms of notification no.132/82-CE is not mentioned among the exceptions. Clause (d) of proviso to Section 11B (2) covers those cases when the incidence of duty paid by the manufacturer had not been passed on to any other person. Thus, for claiming the refund of excess duty paid, the assessee has to prove that the incidence of duty whose refund has been claimed has been borne by him and had not been passed on to any other person. In view of the non-obstante clause of sub-section (3) of Section 11B, all the refund claims made during the period w.e.f. 20.09.1991 would be subject to the principle of unjust enrichment. We find that the same view has been taken by the Apex Court in the decision of **Sahkari Khand Udyog Vs. CCE reported in 2005 (181) ELT 328 (SC),** wherein the Apex Court with regard to the grant of rebate in respect of excess production of sugar in terms of the notification no.108/78-CE held that the same would be subject to the principle of unjust enrichment. In view of this judgement of the Apex court in respect of the refund, irrespective of the purpose for which the duty exemption had been granted under notification no.132/82-CE in respect of the excess production of sugar during the lean period from May, 1982 to September, 1982, the refund on account of this exemption notification would be subject to the principles of unjust enrichment. In view of this, the impugned order is not correct. The same is set aside. The Revenue's appeal is allowed.

[Order pronounced on...26/9/12........].

(Justice Ajit Bharihoke)
President

(Rakesh Kumar)
Member (Technical)

Ckp.