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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/3004/2011-EX[DB]

Dated: **05/07/2012**

Assistant Registrar
C.E.S.T.A.T. New Delhi
To,
SHANKAR PRODUCTS
Sh Ashok Kumar Gupta, partner Behind
Factory No 667, Road No 9F(2), V.K.
Industrial Area, Jaipur.

SHANKAR PRODUCTS (Appellant)

VS

C.C.E. JAIPUR I (Respondent)

I am directed to transmit herewith a certified copy of Final Order No. **A/744/2012-EX[DB]** dated **27/06/2012** 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. JAIPUR I
N.C.R.Building, Statue Circle, "C"
Scheme, jaipur 302005.

2. Advocate(s) / Consultant(s):
V.Lakshmi Kumaran
5,Jangpura Extension,Link Road,New
Delhi-110014

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. Office Copy

13. Gaurd File

Assistant Registrar
EXCISE Appeal Branch

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No.2, R. K. Puram, New Delhi.
Court No. 1

Date of hearing/decision: 27.06.2012

Hon'ble Sh. Justice Ajit Bharihoke, President
Hon'ble Sh. 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.	
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. 3004 of 2011

(Arising out of order in original No. 51/2011(CE)-Commissioner dated 28.09.2011 passed by the Commissioner of Central Excise, Jaipur).

M/s Shankar Products Appellants

Vs.

CCE, Jaipur-I Respondent

Appearance:

Sh. R.K. Hasija, Advocate for the appellants.

Sh. R.K. Verma, AR for the respondent.

Coram: **Hon'ble Mr. Justice Ajit Bharihoke, President**
Hon'ble Sh. Rakesh Kumar, Member (Technical)

FINAL ORDER NO. A/744/2012-EX(BR)

Per: Rakesh Kumar (Oral):

The appellant is engaged in the business of conversion of duty paid sugar into boora, mishri and makhana. The appellant was selling those items without payment of excise duty. The department was of the view that the conversion of sugar into boora, mishri and makhana amounted to manufacture of a new product classifiable under sub-headings 1701.99 (boora) and 1704.90 (mishri and makhana). Accordingly, a show cause notice dated 6.7.2010 raising duty demand of Rs.59,92,542/- was issued to the appellant for the period July 2008 to 4.12.2008 invoking the extended period of limitation. The adjudicating authority after giving opportunity of being heard to the appellant confirmed the duty demand amounting to Rs. 59,92,542/- with interest and also imposed equal amount of penalty.

2. Feeling aggrieved by the aforesaid order, the appellant has preferred this appeal wherein the instant stay application has been moved.

3. Against this order of the Commissioner (Appeals) this appeal has been filed.

4. Heard both the sides.

5. Shri R.K. Hasija, ld. Advocate for the appellant pleaded that irrespective on merits of the case, the duty demand raised vide show cause notice dated 6.7.2010 for the period from July 2008 to 4.12.2008 invoking extended period under proviso to Section 11A(1) of Central Excise Act is time barred as in this case, on the basis of the same set of facts, the Department had earlier issued a show cause notice dated 28.08.2008 for duty demand for the period April 2004 to June 2008 invoking extended period and in view of the Apex Court's judgment in the case of **Nizam Sugar Factory vs. CCE, AP reported in 2006 (197) ELT 465 (SC)** when a show cause notice invoking extended period has been issued for

certain period on the basis of certain set of facts, for subsequent period, the department cannot invoke extended period for demand of duty on the basis of the same set of facts and in this case, therefore, only normal limitation period would be available, and that the duty demand is time barred, and hence the impugned order is not sustainable.

6. Shri R.K. Verma, ld. AR for the respondent, defended the impugned order reiterating the finding of the Commissioner and pleaded that during the period of dispute the appellant had not obtained central excise registration and therefore the extended period has been correctly invoked.

7. We have carefully considered the submissions from both the sides and perused the record. In this case, the department had issued a show cause notice dated 28.08.2008 demanding duty for the period from April 2004 to June 2008 invoking extended period under proviso to Section 11A(1) on the ground that the process undertaken by the appellant amounts to manufacture and they had suppressed the relevant facts from the department. On the basis of the same facts the department has issued show cause notice for subsequent period from July 2008 to 4.12.2008 on 6.7.2010 again invoking the extended period, which in view of the Apex Court's judgement in the case of Nizam Sugar Factory (supra) is not permissible. The relevant observation of Hon'ble Supreme Court in this judgement are reproduced as under:-

> "**8.** Without going into the question regarding Classification and marketability and leaving the same open, we intend to dispose of the appeals on the point of limitation only. This Court in the case of *P & B Pharmaceuticals (P) Ltd.* v. *Collector of Central Excise* reported in (2003) 3 SCC 599 = 2003 (153) E.L.T. 14 (S.C.) has taken the view that in a case in which a show cause notice has been issued for the earlier period on certain set of facts, then, on the same set of facts another SCN based on the same/similar set of facts invoking the extended period of limitation on the

plea of suppression of facts by the assessee cannot be issued as the facts were already in the knowledge of the department. It was observed in para 14 as follows :

> "14. We have indicated above the facts which make it clear that the question whether M/s. Pharmachem Distributors was a related person has been the subject-matter of consideration of the Excise authorities at different stages, when the classification was filed, when the first show cause notice was issued in 1985 and also at the stage when the second and the third show cause notices were issued in 1988. At all these stages, the necessary material was before the authorities. They had then taken the view that M/s. Pharmachem Distributors was not a related person. If the authorities came to the conclusion subsequently that it was a related person, the same fact could not be treated as a suppression of fact on the part of the assessee so as to saddle with the liability of duty for the larger period by invoking proviso to Section 11A of the Act. So far as the assessee is concerned, it has all along been contending that they were not related persons, so, it cannot be said to be guilty of not filling up the declaration in the prescribed proforma indicating related persons. The necessary facts had been brought to the notice of the authorities at different intervals from 1985 to 1988 and further, they had dropped the proceedings accepting that M/s. Pharmachem Distributors was not a related person. It is, therefore, futile to contend that there has been suppression of fact in regard M/s. Pharmachem Distributors being a related person. On that score, we are unable to uphold the invoking of the proviso to Section 11A of the Act for making the demand for the extended period."

This judgment was followed by this Court in the case of *ECE Industries Limited* v. *Commissioner of Central Excise, New Delhi* reported in (2004) 13 SCC 719 = 2004 (164) E.L.T. 236 (S.C.). In para 4, it was observed :

> "4. In the case of *M/s. P&B Pharmaceuticals (P) Ltd.* v. *Collector of Central Excise* reported in [2003 (2) SCALE 390], the question was whether the extended period of limitation could be invoked where the Department has earlier issued show cause notices in respect of the same subject-matter. It has been held that in such circumstances, it could not be said that there was any wilful suppression or mis-statement and that therefore, the extended period under Section 11A could not be invoked."

Similarly, this judgment was again followed in the case of *Hyderabad Polymers (P) Ltd.* v. *Commissioner of Central Excise, Hyderabad* reported in [2004 (166) E.L.T. 151 (S.C.)]. It was observed in para 6 :

> ".......... On the ratio laid down in this judgment it must be held that once the earlier Show Cause Notice, on similar issue has been dropped, it can no longer be said that there is any suppression. The extended period of limitation would thus not be available. We are unable to accept the submission that earlier Show Cause Notice was for a subsequent period and/or it cannot be taken into consideration as it is not known when that Show Cause Notice was dropped. If the Department wanted to take up such contentions it is for them to show that that Show Cause Notice was not relevant and was not applicable. The Department has not brought any of those facts on record. Therefore, the Department cannot now urge that findings of

the Collector that that Show Cause Notice was on a similar issue and for an identical amount is not correct."

9. Allegation of suppression of facts against the appellant cannot be sustained. When the first SCN was issued all the relevant facts were in the knowledge of the authorities. Later on, while issuing the second and third show cause notices the same/similar facts could not be taken as suppression of facts on the part of the assessee as these facts were already in the knowledge of the authorities. We agree with the view taken in the aforesaid judgments and respectfully following the same, hold that there was no suppression of facts on the part of the assessee/appellant."

8. In view of the above discussion irrespective on merit of the department's case against the appellant, the duty demand raised by the show cause notice dated 6.7.2010 is time barred. The impugned order is not sustainable. The same is set aside and the appeal is allowed.

(Justice Ajit Bharihoke)
President

(Rakesh Kumar)
Member (Technical)

Pant