# H.H. Patel and Co. Vs. Commissioner of Central Excise

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**SooperKanoon Citation** : sooperkanoon.com/32005

**Court** : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

**Decided On :** Aug-28-2003

**Judge** : S T Gowri, K Kumar

**Appellant** : H.H. Patel and Co.

**Respondent** : Commissioner of Central Excise

**Judgement** :
1. The application is for waiver of deposit of duty of Rs. 28.86 lakhs approx. penalty of Rs. 10,000/-. Applicant manufactures unbranded tobacco classifiable under sub-heading 10 of heading 24,01 its factory at Chalisgaon in Jalgaon District and removes the entire quantity to its factory at Jamner in the same district, where it is packed and branded and therefore liable to classification in heading 90 labelling, packing of tobacco and packs in retail packs. By application of note 2 to Chapter 24 these acts amount to manufacture. The applicant had determined the value of the tobacco cleared at Chalisgaon on the cost of manufacture by applying Rule 6(b)(ii) of the Valuation Rules. Notice dated April 2002 demanded duty on tobacco cleared by him in 1.4.99 to 31.12.2001 on the ground that in determining the margin of profit had not been correctly calculated and various aspects such as advertisement cost etc. had not been included. In the order, the Commissioner had dropped the demand for the period prior to 15.11.1999 on the view that the extended period of limitation will not apply. He has confirmed the demand for the remaining period.

2. The contention of the counsel for the applicant that the extended period of limitation will not apply therefore no duty would be payable prior to March 2001 has to be accepted. The Commissioner says that for demanding the duty in the period the assessment were provisional and the applicant had not furnished the chartered accountant certificate required for completing. There is no material to show that the Rule 9b was passed when the assessment was provisional. The Commissioner's order seems to suggest that he has demanded duty of this period that the applicant did not submit a chartered accountant certificate. If the assessment were in fact provisional, it would have to be held that the entire demand is premature since no demand for duty short paid and only the issue after the assessment was finalised for issue of proper order, no such order has been passed. The Supreme Court in its judgment in Amco Batteries Ltd. v. CCE 2003 (153) ELT 7 has found that the fact that the appellant before it could take modvat credit of the duty paid by job worker and received the goods justifies that the extended period will not apply. The same view has been expressed by the tribunal in Essel Packaging v. CCE 2001 (117) ELT 466 the extended period of limitation prima facie will not apply. The demand for the 13 months preceding issue of notice comes to around Rs. 7.50 lakhs. The issue as to whether the determination of the duty if any actually payable by the assessee requires considerable examination on the basis of which some elements such as advertisement charges which would not form part of the cost of manufacture since they are charges related to sale that come into the picture.

3. On these prima facie views, we direct deposit by the applicant of Rs. 5 lakhs from its personal ledger account within two months from today, upon which we waive deposit of the remaining duty and penalty and stay its recovery.