IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH : ALLAHABAD
COURT No. I

APPEAL Nos. E/2837 & 2838/2011-EX[SM]

(Arising out of Order-in-Appeal No. 142-143/CE/APPL/ALLD/2011 dated 05/09/2011 passed by Commissioner of Central Excise (Appeals), Allahabad)

M/s Veekay Connectors (Pvt) Ltd (in Appeal No. E/2837/2011) **&**

Shri V. K. Mittal, Managing Director (in Appeal No. E/2838/2011)

Appellant(s)

Vs.

Commissioner of Central Excise, Allahabad **Respondent(s)**

Appearance:

Shri Rajesh Chhibber (Advocate) & Shri Sita Ram (Consultant)
for Appellant(s)
Shri Gyanendra Kumar Tripathi (AC) AR for Respondent(s)

CORAM:

Hon'ble Mr. Anil G. Shakkarwar, Member (Technical)

Date of Hearing : 13/07/2018
Date of Decision : 13/07/2018

FINAL ORDER NOs. **71591-71592 / 2018**

Per: Anil G. Shakkarwar

Above stated two appeals are taken together for disposal since they are arising out the same impugned order.

2. Brief facts of the case are that the appellants were engaged in the manufacture of Optical Fibre Cable Accessories for use by Government of India undertaking BSNL/MTNL. On the basis of investigations a show cause

notice dated 31.08.2006 was issued demanding Central Excise Duty of Rs. 34,89,665/- from the appellant with further proposal to impose penalty on the other appellant. After passing through the various stages of litigation through Order-in-Original dated 17.09.2010, the demand of Rs.13,02,885/- was confirmed and appellant were directed to pay interest on the delayed payment under Section 11AC of Central Excise Act, 1944 and another penalty of Rs.13 lakhs was imposed on Shri V.K. Mittal the other appellant under Rule 26 of Central Excise Rules, 2004. Appellant carried the matter before Commissioner (Appeals who did not interfere with the said Order-in-Original dated 17.09.2010. Aggrieved by the said order appellants are before this Tribunal.

3. Learned Counsel for the appellants has submitted that the demand confirmed had two components, one component was related to computation of Central Excise duty in respect of goods for which Revenue could find parallel invoices from the record of the appellant. The goods involved in the said parallel invoices did not suffer duty and said duty was computed to the tune of Rs.6,19,602/-. He has submitted that before issue of show cause notice said duty was paid and interest was paid during compliance to Order of Stay passed by this Tribunal. He has submitted that the confirmed of the demand of Rs.13,02,885/- included demand of Rs.6,19,602/- on account of parallel invoices and the balance was on

account of discrepancies between the recorded manufacture of the goods and recorded quantity of goods computed on the basis of inspection certificates issued by the purchaser and also on the basis of few GRs which did not have matching invoices in the record of the appellant. The said confirmed demand was also has one component where there were allegations that appellants clandestinely supplied goods to V.K. Industries. The appellant submitted that in respect of the demand confirmed related to parallel invoices penalty may be reduce to 25% with an option to pay the same within Statutory Limitation provided under Section 11AC. The learned counsel submitted that the balance demand which was confirmed, was on account of three issues such as having no matching invoices as compared to GRs, goods allegedly clandestinely removed to V.K. Industries and difference between the goods manufacture and inspected. He has argued that the sole basis for conclusion of clandestine manufacture cannot be the inspection report issued by purchaser of the goods. He has submitted that Hon'ble High Court of Allahabad in the case of Continental Cement Company vs. Union of India reported at 2014 (309) ELT 411 (All.) has held that clinching evidence is required of purchase of raw material, use of extra electricity, sale of final products, clandestine removal, transportation, payment, realization of sale proceeds, mode of flow back of funds and it was held by the Hon'ble High Court that in the absence of such evidence clandestine manufacture cannot be established. He has submitted that the said ruling is squarely applicable in the present case since except the inspection certificates there was no other evidence such as procurement of raw materials, clandestine removal, realization of sale proceeds, etc., and therefore, the said allegation is not sustainable. He has further submitted that in respect of GRs the demand was of negligible nature and that out of large number of GRs in minor number of GRs the invoices did not match and that could be because of the error on the part of one who has issued the GRs. In so far as supplies to V.K. Industries is concerned he has submitted that the allegation in the show cause notice is that the appellant has clandestinely removed goods to V.K. Industriesand that however, V.K. Industries has issued the goods manufactured out of said allegedly clandestinely procured goods through regular invoices. He has submitted that no flow back of financial transaction has been established in respect of said allegations and, therefore, the said allegation is also hit by ruling by Hon'ble High Court referred to above. In respect of personal penalty on the other appellant under Rule, 26 of Central Excise Rules, 2002, he has submitted that there was no proposal in the show cause notice for confiscation of goods and it was decided in plethora of decisions that unless the person is involved in dealing with the goods liable for confiscation penalty under Rule, 26 cannot be imposed. He has relied on Final Order No.

70539/2017 dated 17.05.2017 passed by this Tribunal in the case of M/s Escorts ltd. vs. Commissioner of Central Excise, Noida. In respect of penalty under Section 11AC of the amount equivalent to the duty liability accepted by appellant to the tune of Rs.6,19,602/-, he has also relied on the following decisions of the Tribunal in CCE, Kanpur vs. Narendra Products reported at 2010 (253) ELT 201 (Tri.) and CCE, Kanpur vs. Swastik Tubes Pvt. Ltd. reported at 2010 (249) ELT 297 (Tri.) and contended that since the duty of Rs.6,19,602/- was paid before issue of show cause notice and, therefore, as held in the above stated two cases they should be given an option of reduce penalty of 25% if such option was not given by Original Authority and further submitted that at any stage of litigation such option can be given to the appellant.

4. Heard the learned AR for the Revenue who has supported the impugned Order-in-Appeal.

5. Having considered the rival contention and on perusal of record I find that above recorded arguments of learned counsel for the appellants are sustainable in law and, therefore, I modify the impugned order to the following extent:-

(i) The duty demand of Rs.6,19,602/- is confirmed. The interest thereon is already paid.

(ii) Under Section 11AC of Central Excise Act, 1944 penalty of Rs.6,19,602/- is imposed. The appellant is given an option to pay 25% of the said penalty within a period of 30 days from the receipt of this order.

(iii) The remaining demand is set aside

(iv) Since there was no confiscation of goods, personal penalty of Rs.13 lakhs imposed on the other appellant under Rule 26 of Central Excise Rules, 2002 is set aside.

6. In above manner the impugned order is modified and Appeal No. E/2837/2011 is allowed partially and Appeal No. E/2838/2011 is allowed.

(Dictated and pronounced in Court)

Sd/-
(Anil G. Shakkarwar)
Member (Technical)

Ankit