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

APPEAL No. E/70787/2018-EX[SM]

(Arising out of Order-in-Appeal No. NOI-EXCUS-001-APP-1605 & 1606-17-18 dated 11/01/2018 passed by Commissioner (Appeals), Central Goods & Service Tax, Noida)

Commissioner of Customs & Central Excise, Noida-I **Appellant**

Vs.

M/s Merino Industries Ltd. **Respondent**

Appearance:

Shri Shiv Pratap Singh (Dy. Commr.) AR for Appellant
Absent for Respondent

CORAM:

Hon'ble Mrs. Archana Wadhwa, Member (Judicial)

Date of Hearing : 11/03/2019
Date of Decision : 11/03/2019

FINAL ORDER NO. - **70525/2019**

Per: Archana Wadhwa

Being aggrieved with the order passed by Commissioner (Appeals) Revenue has filed the present appeal. I have heard Shri Shiv Pratap Singh learned A.R. appearing for the Revenue. Nobody appeared for the respondents.

2. On going through the impugned order, I find that the respondents were manufacturing Potato Flakes and were clearing the same M/s Kasturi Bai Gopi Babu Cold

Storage Pvt. Ltd., without issuing any invoices and without having permission under Rule 4(4) of the Central Excise Rules, 2002. The officers of Central Excise visited the premises of Kasturi Bai Gopi Babu Cold storage and on physical verification of the stock found that the said goods alongwith other goods were being cleared by them without payment of duty. The same were accordingly seized.

3. On the above basis show cause notice dated 23/12/2016 was issued to the respondents calling upon them to show cause as to why seized goods should not be confiscated and penalty should not be imposed upon them and duty involved therein to the extent of Rs.26,59,393/- should not be recovered from them. The said show cause notice culminated into the order passed by the Original Adjudicating Authority confirming the demand and confiscating the goods with an option to the assessee to redeem the same. Penalties were also imposed under Section 11AC of the Central Excise Act equivalent of the duty demand.

4. On appeal, Commissioner (Appeals) observed that during the relevant period, the classification of Potato Flakes was under dispute and the issue was pending

before the Tribunal. The same was ultimately resolved by the Tribunal's vide Final Order No. A/70806-70807/2017-EX[DB] dated 09/08/2017 upholding the assessee's claim of classification, which hold the goods as chargeable to *nil rate* of duty. As such, he observed that neither the seizure of the goods nor the confiscation of the same was justified and accordingly set aside the order of the Lower Authorities.

5. Revenue in their memo of appeal has not disputed the applicability of the Tribunal's order referred supra. Their only ground is that the said order has not been accepted by the Revenue and appeal stands filed their against which SLP stands admitted on 18/05/2018. However, it is not the Revenue's case that the Tribunal order has been stayed by the Hon'ble Supreme Court. In that scenario, the reliance on the decision of the Tribunal by the Commissioner (Appeals) cannot be faulted upon. Revenue's appeal is accordingly rejected.

(Dictated & Pronounced in Open Court)

Sd/-
(Archana Wadhwa)
Member (Judicial)

Lks