CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
OLD RED BUILDING, 38,M.G.Marg,CIVIL LINES, ALLAHABAD

Dated: 13/5/2016

To

Appellant as per address in table below

Respondent as per address in table below

Final Order No. A/ 70179/2016 SM dated 09/05/2016

I am directed to transmit herewith a certified copy of order passed by the Tribunal under section 35-C(1) of the Central Excise and Salt Act, 1944.

Asstt. Registrar

Application	Appeal	Name and Address of Appellant
	E/55427/2014	K.P.PAN PRODUCTS PVT LTD C-524, TRANSPORT NAGAR KANPUR ROAD, LUCKNOW
	Name and Address of Respondent	COMMISSIONER OF CENTRAL EXCISE, LUCKNOW 7-A, ASHOK MARG, LUCKNOW

Other Appellants and Respondents as per Annexure

Copy To

3 Advocate(s) / Consultant(s SH RUPESH KUMAR,ADV
F-12A,(L.G.F) KAILASH COLONY
NEW DELHI-48

4 Bar Association, CESTAT, ALLAHABAD

5 Director Publications, Customs, Excise. I.P. Estate, Delhi

6 M/s Centax Publications Pvt. Ltd., 1512-B, Bhishm Pitamah Marg, 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, Satellite Road, Ahmedabad-15

10 LAWCRUX Advisors Pvt. Ltd., LAW House, 1-8, Sector-10, Faridabad 121003 (Haryana)

11 TaxIndiaOnline.com Pvt. Ltd., 2nd Floor, Vasant Arcade, Vasant Kunj, New Delhi - 110070

12 Mark Professional Services Pvt. Ltd., 108, Everest Block, Aditya Enclave, Hyderabad - 38

13 The ICFAI society, 52, Nagarjuna Hill,Punjagutta Hyderabad.-500082

14 C.D.R. 15 Office Copy 16 Guard File.17.M.S KNOWLEDGE PROCESSING PVT LTD(TAMMANAGEMENTINDIDA.COM)

Asstt. Registrar
Regional Bench, Allahabad

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, REGIONAL BENCH : ALLAHABAD

Ex.Appeal No.55427/14

Arising out of OIA No.81-CE/LKO/2014 dated 04/08/2014 passed by the Commissioner (Appeals), Central Excise & Service Tax, Lucknow.

For approval and signature:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)

1.	Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	: No
2.	Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	: Yes
3.	Whether His Lordship wishes to see the fair copy of the Order?	: Seen
4.	Whether Order is to be circulated to the Departmental Authorities?	: Yes

M/s K. P. Pan Products Pvt. Ltd. ...APPELLANT(S)

VERSUS

Commissioner of C.Ex. & S.Tax, Lucknow RESPONDENT (S)

APPEARANCE

Shri Rupesh Kumar & Shri Aditya Kumar, both Advocates for the Appellant (s)
Shri Pawan Kumar Singh, Supdt. (A.R.) for the Respondent

CORAM:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)

DATE OF HEARING : 29.04.2016

DATE OF PRONOUNCEMENT : 09.05.2016

Final ORDER NO. 70179/2016

Per Mr. Anil Choudhary :

The appellant, being a manufacturer of pan masala and gutka (Rajshree Brand) is in appeal against order in appeal dated 04.08.2014 passed by the Commissioner (Appeals), Customs, Central Excise and Service Tax, Lucknow.

2. The brief facts are that the appellant is paying tax on the basis of production capacity under the Pan Masala Packing Machines (Capacity Determination and Collection of Duty) Rules, 2008. A search was conducted in the premises of one M/s Vinay Wires & Poly Products Pvt. Ltd. Unit 1 & 2, Kanpur and other related establishments including that of this appellant, M/s K. P. Pan Products Pvt. Ltd., Lucknow and one, M/s Kanan Graphics (P) Ltd., Kanpur. The physical stock of raw material/inputs was taken at the time of search in the premises of the appellant. A total stock of 13,440.55 Kgs. Of Rajshree brand laminates and outers carry bags and laminated pouches were found in the factory. As there was no responsible person present in the factory to explain the licit source of purchase and entry in the stock records, the stock of laminated and outer laminated pouches was detained on the date of search - 30/6/09. It further appeared to Revenue during the course of investigation that the said M/s Vinay Wires & Poly Products Pvt. Ltd., Kanpur had clandestinely removed the packing material and the appellant had clandestinely purchased packing material from the said M/s Vinay Wires & Poly Products Pvt. Ltd., Kanpur. Further, the Director of the appellant company in spite of several summons, failed to appear before the authority to explain the

licit purchase of packing material. Under the reasonable belief that the detained goods are liable for confiscation, the same was seized on 21/8/09. Show cause notice dated 22/12/2009, was issued stating therein that the Director of the appellant, Mr.Manish Agarwal, have failed to appear and to explain the licit source of purchase of the packing materials valued at Rs.17,35,244/- and accordingly, the same appears to be liable for confiscation under Rule 25 of CCR. It further appeared that the said M/s Vinay Wires & Poly Products Pvt. Ltd., Kanpur, have cleared the packing materials clandestinely without payment of duty to the appellant as admitted by Mr.C. N. Malviya, the Director of M/s Vinay Wires & Poly Products Pvt. Ltd., Kanpur, in a statement dated 16/7/2009 including clandestine clearance to Kaveri Graphics (which was earlier known as Diamond Graphics Private Ltd.). Further, the invoices were issued by M/s Vinay Wires & Poly Products Pvt. Ltd., Kanpur in the name of BKG Enterprises, Kanpur and after receipt of the material by the appellant, the said invoices were returned and the same were destroyed by M/s Vinay Wires & Poly Products Pvt. Ltd., Kanpur and/or used for issue of duplicate invoices under the same invoice numbers for removal of granules as such. Further, it appeared to Revenue that the whole stock detained and seized, valued at Rs.17,35,244/- is liable for confiscation being packing materials which were removed and cleared by Vinay Wires, clandestinely purchased by the appellant and others and accordingly, it was proposed to confiscate the packaging materials involving the Central Excise duty of Rs.1,42,984.10 under Rule 25 of CCR and further penalty was proposed under Rule 25 read with Section 11 AC of the Act.

3. The appellant appeared and contested the show cause notice, stating that they are paying duty under Section 3A of the Central Excise Act, read with Pan Masala Packing Machines (Capacity Determination and Collection of Duty) Rules, 2008. It was further contended that provisions of Rule 25 of CCR are not applicable in the appellant's case since Rule 17 (1) of Pan Masala Packing Machines (Capacity Determination and Collection of Duty) Rules, 2008, contains the provision for confiscation. Further, the Rule 18 of Pan Masala Packing Machines (Capacity Determination and Collection of Duty) Rules, 2008, clarifies that the provisions of the Act & Central Excise Rules shall apply *mutatis mutandis* including Rules of CCR, 2002 which relates to maintainance of daily stock account, removal of goods and invoice, filing of returns and recovery of dues. It is further contended that as Rule 25 is not applicable on them, packing materials cannot be confiscated being the raw materials or inputs of the appellant. It was further contended that even on the plain reading, Rule 25 is not applicable to the appellant as the same is applicable only to manufacturer, registered person of a warehouse or a registered dealer of the product concerned. It was also further contended that Rule 25 relates to output or the goods manufactured and the same is not attracted on inputs of the appellant. Further, it is contended that the revenue have not brought on record to prove that the goods seized have actually been manufactured and cleared by M/s Vinay Wires &

Poly Products Pvt. Ltd. and further the same have been cleared without payment of duty. The whole case is made only on presumption and on the basis of the statement of Mr.C.N.Malviya, Director of M/s Vinay Wires & Poly Products Pvt. Ltd. It was further contended that Mr.Malviya had immediately, within less than 7 days, retracted his statement, and as such, no adverse inference can be drawn on the basis of retracted statement. Further, no documents have been brought on record by Revenue in support of its case of clandestine purchases by the appellant. It is further contended that pursuant to completion of investigation by DGCEI, show cause notice have been issued to M/s Vinay Wires & Poly Products Pvt. Ltd. and in that show cause notice, this appellant has not been made a party or implicated by the Revenue. In this view of the matter also, no case is made out against the appellant. The SCN was adjudicated vide OIO dated 31/1/13 conforming the proposed confiscation of the packing materials valued at Rs.17,35,244/- granting option to redeem on payment of redemption fine being 25% of the value or Rs.4,33,811/- within one month of receipt of that order. Further penalty was imposed being equal to duty on the packing material at Rs.1,42,984/- under Rule 25 of CER read with Section 11 AC of the Act. It was observed in the order in original that from the seized documents and the confessional statement of Mr.C.N.Malviya, Director cum Manager of M/s Vinay Wires & Poly Products Pvt. Ltd., appellant have purchased materials without payment of duty, clandestinely removed by M/s Vinay Wires & Poly Products Pvt. Ltd.. It was further observed that after receipt of the raw materials by the appellant, the invoices were returned and the same were destroyed by M/s Vinay Wires & Poly Products Pvt. Ltd. and they generated the same invoice number either for unaccounted sale or showing cash sale of granules for stock adjustment of granules, the raw materials of laminates. Further, adverse view was taken in view of non-cooperation of the appellant and its Directors in the process of investigation.

4. Being aggrieved the appellant preferred appeal before the ld. Commissioner (Appeals) who vide the impugned order, have been pleased to uphold the confiscation under Rule 25 of CER but at the same time, it is held that penalty is not imposable under Rule 25 and have imposed a penalty of equal amount under Rule 26 of CER.

5. Being aggrieved, the appellant is in appeal before this Tribunal. On the basis of the grounds urged by the ld. Counsel for the appellant, the issue before this Tribunal is - whether penalty have been rightly imposed under Rule 26 by ld. Commissioner (Appeals) and whether when penalty under Rule 25 have been held to be unsustainable, whether the confiscation of the packing materials have rightly been upheld.

6.1 The ld. Counsel for the appellant has reiterated the grounds raised before the Court below and further stated that it is evident from Annexure A-SCN that the packing materials detained and subsequently seized includes both the materials purchased in U.P. and packing materials purchased from outside U.P.. The revenue have not cared to verify the stock of the packing materials found in the factory premises with the records and evidence of purchase order vide S.No.2 & 3 of

Annexure-A to SCN which are files containing documents regarding purchase of packing materials. Neither before issue of show cause nor at the adjudication stage, the authority have cared to look into the available records with them and the whole demand is only based on presumption of clandestine purchase by the appellant. It is further contended that ld. Commissioner (Appeals) in observing that as the appellants have not given any explanation of the stock of packing materials, the same has been procured from M/s Vinay Wires & Poly Products Pvt. Ltd without invoices. It is further contended that as the records had been resumed by the Department It was not possible for the appellant to produce the documents relating to the licit purchase of packing materials. Further, revenue has not discharged burden of proof to establish that the appellant had procured the seized packing materials clandestinely. It is further urged that the retracted statement cannot be relied upon without independent corroboration. It is further urged that SCN issued to M/s Vinay Wires & Poly Products Pvt. Ltd., alleged supplier of the packing materials, was pending adjudication, hence prior adjudication of appellant, have resulted into miscarriage of Justice. As the findings in the case of M/s Vinay Wires & Poly Products Pvt. Ltd. will have a direct bearing on the adjudication in the case of this appellant. It is further contended that the case of revenue is based on computer printout alleged to have been taken out from the computer of one - M/s Anand Sales, Kanpur, whose premises was also searched on 30/6/09 along with M/s Vinay Wires & Poly Products Pvt. Ltd.. On the basis of the print outs, a number of show cause notices were issued arising from same investigation and some of these were decided by different adjudicating authority. In the batch of appeals in similar matter arising from same investigation, This Tribunal vide Final Order No. A/55481-55501/2013-Ex.-DB dated 23/1/13, remanded the cases to the adjudicating authority, Commissioner (Special Adjudication) Central Excise, New Delhi. It is further contended that in any view of the matter, penalty is not imposable on the appellant.

6.2 The ld. Counsel of also relied on the rulings in the cases of (i) Kashi Laminators (P) Ltd. Vs. Commr. of Central Excise, Lucknow : 2014 (314) ELT 327 (Tri.-Del.), wherein it was held that for excess stock of Inputs, penalty under Rule 25 was not sustainable ; (ii) A. Tajudeen Vs. Union of India : 2015 (317) ELT 177 (SC), wherein it was held that the retracted statement is not reliable, without independent corroboration.

7. The ld. AR for revenue relies on the impugned order. He further states that the appellant being a registered manufacturer, was required to explain the licit acquisition or purchase of the packing materials which they have failed to do so. Further there is admission made by Director cum Manager of M/s Vinay Wires & Poly Products Pvt. Ltd. It is further contended that goods/inputs found, non-duty paid, which are otherwise dutiable, the same can be confiscated. He further relies on the ruling in the case of Amad Noormamad Bakali Vs. State of Gujarat : 2011 (274) ELT 17 (Guj.) wherein it was held that statement recorded by Revenue Officer is admissible in evidences as the same is not recorded before the police and not hit by Sections 34

or 30 of the Indian Evidence Act, 1872. Moreso, as the contentions regarding coercion and threat had been considered and rejected.

8. Having considered the rival contentions, in view of the provisions of Rule 25 read with Rule 10 of CER, it is evident that the appellant being a manufacturer and a registered dealer, is required to maintain proper account of duty paid inputs or of inputs which are excisable. As clause (b) of Rule 25 provides that where the assessee does not account for any excisable goods produced or manufactured, then the said goods shall be liable to confiscation and such purchasers or manufacturer or registered person shall also be liable to penalty not exceeding the duty on the excisable goods, in respect of which any contravention has been committed. Even in absence of the statement of Mr.C.N.Malviya Director/Manager of M/s Vinay Wires & Poly Products Pvt. Ltd., the appellant as a manufacturer, registered with the Central Excise Department, is obligated to maintain proper accounts of taxable inputs. The appellant was obligated to explain the licit source of purchase of the packing materials lying in stock. It is evident that the appellant have not made any attempt to explain before the Courts below nor have filed any such explanation before this Tribunal. In this view of the matter, I uphold the order of confiscation of the packing materials. So far redemption fine is concerned, I reduce the same to the amount of duty evaded at Rs.1,42,984/-. As the appellant have himself not removed the excisable goods from the factory of manufacture, I hold that no penalties are leviable under Rule 25 of Central Excise Rules 2002. So

far the penalty imposed by ld. Commissioner under Rule 26 of Central Excise Rules, 2002, is concerned, I set aside the same as the same have been imposed without any notice to the appellant and/or opportunity of hearing.

9. Thus, the appeal is allowed in part as indicated above.

10. In a nutshell, to sum up :

(i) Confiscation is upheld ;

(ii) Redemption fine is reduced to Rs.1,42,984/- ;

(iii) Penalties under Rule 26 and Rule 25, stand set aside.

(Pronounced in the open Court on 09-05-16)

(ANIL CHOUDHARY)
MEMBER (JUDICIAL)

mm

प्रमाणित प्रति / Certified True Copy
7.6.16
सहायक पंजीकार / Asstt. Registrar
सीमाशुल्क, उत्पादशुल्क एवं सेवा कर
अपील अधिकरण / (C.E.S.T.A.T.)
38, एम. जी. मार्ग, इलाहाबाद-211001
38, M. G. MARG, ALLAHABAD-211001