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REGISTERED / AD

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
38,MG Marg Civil Lines,Old Red Building,Allahabad-211001
Regional Branch, Allahabad

Dated: 27/09/2017

To

Appellant as per address in table below

Respondent as per address in table below

Final Order No. A/71147/2017-SM[BR] dated 24/03/2017

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
1	E/Stay/1834/2009	E/1777/2009	THE GENERAL MANAGER, KANCOR INGREDIENTS LTD. B4 & B5, INDUSTRIAL ESTATE, C.B. GANJ, BAREILLY. (U.P.)
			Name and Address of Respondent
2			-C.C.E. MEERUT II Opp. Saheed Park (Near Ashok ki Lat) Delhi Road, Meerut (UP)

Copy To
3Advocate(s) / Consultant(s):

KAPIL VAISH
2ND FLOOR, PART-A KRISHNA JANKI
PALACE, 35-C, RAMPUR GARDEN,
CIVIL LINES, BAREILLY, UP

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 LAWCRUX Advisors Pvt. Ltd., LAW House, 1-8, Sector-10, Faridabad 121003 (Haryana)
10 TaxIndiaOnline.com Pvt. Ltd., 2nd Floor, Vasant Arcade, Vasant Kunj, New Delhi - 110070
11 Mark Professional Services Pvt. Ltd., 108, Everest Block, Aditya Enclave, Hyderabad - 38
12 The ICFAI society, 52, Nagarjuna Hill,Punjagutta Hyderabad.-500082
13 M/S Knowledge Processing Pvt. ltd.(taxmanagementindia.com),FF-19,1st Floor,Cross River Mall,CBD Ground,Near Karkardooma Court,Delhi-110032

14 C.D.R. 15 Office Copy ~~16~~ Guard File

Asstt. Registrar

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

Appeal No. E/1777/2009-EX[SM]

Arising out of Order-in-Appeal No. 147-CE/MRT-II/2009 dated 30.03.2009 passed by Commissioner (Appeals), Customs & Central Excise, Meerut-II.

The General Manager, Kancor Ingredients Ltd. APPELLANT

VERSUS

Commissioner, Central Excise, Meerut-II ...RESPONDENT

APPEARANCE

Shri Ashish Vaish, C.A. for the Appellant
Shri Sandeep Kumar Singh, Deputy. Commr. (A.R.) for the Department

CORAM:

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

DATE OF HEARING & PRONOUNCEMENT : 24. 03. 2017.
FINAL ORDER NO.-71147/2017

Per Mr. Anil Choudhary :

The issue in this appeal by the appellant-assessee a manufacturer of Menthol/DMO etc. is whether duty have been rightly demanded on the 71 drums of DMO lying in the factory premises on the date of inspection/panchnama dated 27/07/2006.

2. The brief facts are that there was an inspection in the factory premises on 27/06/2006. On scrutiny of daily stock account, RG-1 register maintained, revealed that the stock of DMO was not recorded therein. Production or clearance of DMO. was not mentioned. On physical verification, 71 GI drums containing

12,683.900 kg. DMO (De-mentholized Oil) valued at Rs.46,93,043/- was found involving duty of Rs.7,65,905/-. Out of the 71 drums, 55 GI drums were found tagged showing quantity and weight of DMO contained in each drum and 16 GI drums containing DMO were not tagged. Statement of Mr Pawan Gupta, Executive Accounts was recorded, who stated that they also manufacture DMO in their unit and further stated and accepted that they have neither maintained any record for production of DMO nor they have recorded the production of DMO in their daily stock account register. Further, Mr. Gupta accepted that DMO is marketable and excisable commodity. It further appeared that DMO attracts a duty under sub heading 3301 2590 of the first schedule to CETH. It also appeared that the appellant had mentioned DMO as a final product in his application for registration. It was also stated by Mr. Gupta that they have exported DMO in the past. It was also stated by Mr. Gupta that they can use DMO either for manufacture of menthol crystals, their main final product are for exporting the DMO as such. Accordingly, as appeared to Revenue that the said DMO was a marketable stage and were kept unrecorded with intention to remove clandestinely at an opportune time without payment of duty. The subject goods being 71 drums of DMO were seized under a panchnama. Thereafter, show cause notice dated 24th January, 2007 was issued proposing to confiscate the 71 drums of DMO under Rule 25 of CER, 2002 and further proposal to impose penalty was made. Further, facts on record also show there after the inspection/seizure on 27/07/2006, the appellant by their letter dated 31/07/2006 addressed to the Assistant Commissioner stated that DMO had arisen in their factory in the process of manufacture of menthol crystals. Though it is in the nature of byproduct, it cannot be sold as such. It needs to undergo further processing and distillation before it can become marketable commodity. The appellant uses whole of the DMO generated to recharge/reuse along with Menthol Flakes (Menthol powder)/Mentha oil for manufacture of menthol crystals. It is an ongoing process which is peculiar to the industry. It is always the endeavor of the appellant to obtain maximum final product by charging and recharging the DMO. It is further stated that as the DMO found and seized in the factory premises on date of inspection had not reached the marketable stage, they were under *bona-fide* belief that they are not required to record the same in their RG-1 register. In their further representation dated 21st August, 2006 to the Assistant Commissioner, the appellant stated that the DMO as found and seized was not marketable and it requires further stages of processing/distillation, so as to become marketable/sellable like: –

Process stage I – cooling process for three days in cooling chamber.

Process stage II - separate oil and small crystals through centrifuge method.

Process stage III - WIP solution charged into distillation vessel and apply various temperature.

Process stage IV - vaporisation of oil and condensation.

Process stage V - analysis of various cut received after the distillation.

Process stage VI - rearranging of various components by blending.

Process stage VII - blend material to pass through filtration equipment.

Process stage VIII - final packing and dispatch of material.

He further stated that by way of trade practice both raw oil and the treated oil are termed as de-mentholized oil. The oil in order to be sold has to undergo further manufacturing process as detailed here in above. It was further asserted that this fact can be confirmed by comparing analysis of a sample of the goods seized from the appellant with a sample of DMO being sold in the market. It was also stated that the appellant had got an export order in hand which is required to be executed urgently and accordingly he had prayed for release of the seized materials. The SCN was adjudicated on contest, vide OIO dated 28/03/2008 by the Joint Commissioner ordering confiscation under Rule 25, further option to redeem on payment of fine of Rs.8,00,000/- on the appellant. Further, penalty of Rs.7,65,905/- was imposed under Rule 25 being the Excise duty calculated on the seized DMO readwith Section 11AC of the Act. Being aggrieved, the appellant preferred appeal before learned Commissioner (Appeals), who vide impugned order was pleased to reject the appeal observing that though action for removal could not be accomplished, but the offence started from the stage when the records were not maintained and the material was not accounted for in the records.

3. Being aggrieved, the appellant is before this Tribunal.

4. The learned counsel for the appellant have urged that the DMO so found and seized was part of the work in progress and not finished goods. The DMO was lying in old drums and quantity lying

in each drum was not prefixed. The drums were neither sealed and in most of the cases, there was no tag of the quantity of solution lying in the drums. It was further urged that the material was lying inside the factory and no action was being taken to remove the same clandestinely. Thus, the allegation of Revenue is only based on assumptions and presumptions having no legs to stand. So far, the cogent explanation given at the time of investigation that the DMO arises by way of a by-product in the process of manufacture of menthol crystals, the said by-product–DMO is further usable for manufacture of more menthol crystals by adding menthol flakes etc. have not been found to be untrue. Further, explanation given by the appellants that DMO of only particular grade and/or composition is marketable and/or salable and it is not that any and every kind of DMO is sellable which contention has also not been rebutted and/or found to be wrong by the Revenue. Further, the request made by the appellant to test the seized DMO and compare the such test report DMO as available in the market was not adhered to and as such the allegations in the show cause notice are vague and not tenable. It is also urged that the DMO for the purpose of sale and marketing is further processed by way of job work, whenever the appellant has order in hand, otherwise they do not resort to manufacture of DMO for marketing purpose and keep reprocessing the DMO from one process to the other process by further adding the additives; though the Revenue had drawn samples at the time of provisional release but why said samples were not tested is best known to the Revenue.

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Learned counsel further relied on the ruling of a co-ordinate Bench of this Tribunal in the case of ***Morakhia Metals & Alloys Pvt. Ltd. vs. C.C.E. & S.T., Ahmedabad-III 2015(330) E.L.T. 325 (Tri.-Ahmd.)*** wherein unaccounted finished goods were found on premises. It was held that mere unaccounted goods found in factory premises is not by itself a sufficient evidence of clandestine clearance. There is no admission of intention to clear the goods clandestinely and certificate of chartered engineer has also been produced stating that impugned goods were not fully finished goods, but goods in process requiring further test and operations without which, it did not become final marketable goods. Further, in the absence of evidence of clandestine clearance, the order of confiscation and penalty was set aside. Under similar facts and circumstances another co-ordinate Bench in ***Commissioner of C.Ex. & S.T., Ludhiana vs. Amrit Soap Company 2015(329) E.L.T. 190 (Tri.-Del.)*** have also similarly set aside order of confiscation and penalty. Accordingly, the learned counsel prays for allowing the appeal with consequential benefits.

5. The learned A.R. for Revenue have relied on the impugned order and the allegations in the show cause notice as hereinabove noticed.

6. Having considered the rival contentions, I find that there is lack of sufficient material on record to support the contention of the Revenue that the DMO so found and seized was in marketable stage. Further, I find that Revenue have failed to investigate further

on the assertions and explanations given by the appellant that the DMO was not marketable but requires further stages of processing to make it marketable and also insisted on test report, which was not done and as such, I find that there is lack of material to support the allegations in the show cause notice. It is further a fact on record that the DMO was found inside the factory premises and there was no action and/or attempt on the part of the appellant to remove the same clandestinely. In view of these facts on record I hold that the show cause notice is vague and not tenable. Accordingly, the appeal is allowed and the impugned order is set aside, with consequential relief if any.

(Order was dictated in the open Court)

-Sd/-
(ANIL CHOUDHARY)
Member(JUDICIAL)

patel/-

Certified True Copy
13/10/17
Asstt. Registrar
C.E.S.T.A.T.
ALLAHABAD-211001