FAX : 0532-2400149

REGISTERED / AD

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

To

Dated: 17/11/2017

Appellant as per address in table below
Respondent as per address in table below

Final Order No. A/71387/2017-SM[BR] dated 13/11/2017

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 | |
|---|---|---|
| 1 | E/2281/2009 | Name and Address of Appellant<br>CCE & ST<br>7-A, Ashok Marg, Lucknow. |
| 2 | | Name and Address of Respondent<br>SHYAM TRADERS<br>255/62, KUNDARI, RAKAB GANJ, lUCKNOW(UP),, |

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

**Pratick Dawar, Adv**
**117/10 SK APARTMENT**
**SARVODAYA NAGAR,**
**KANPUR,**
**UTTAR PRADESH**

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, Opp ICICI Bank of Defence Colony 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 Second Folder Copy 17 Guard File

Asstt. Registrar

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

**Ex.Appeal No.2281/09**

Arising out of O/A No.109-CE/LKO/2009 dated 11.05.2009 passed by Commr. (Appeals) of Central Excise, Customs & Service Tax, Lucknow

Commr. of Central Excise, Lucknow

...APPELLANT(S)

VERSUS

M/s Shyam Traders

RESPONDENT (S)

APPEARANCE

Md. Altaf, Asstt. Commissioner (A.R.) for the Revenue
Shri Pratick Dawar, Advocate for the Respondent (s)

**CORAM:**

MRS. ARCHANA WADHWA, HON'BLE JUDICIAL MEMBER

DATE OF HEARING/DATE OF DECISION : 13. 11. 2017

Final ORDER NO.71387/2017

**Per Mrs.Archana Wadhwa :**

Being aggrieved by the Order of the Commissioner (Appeals), the Revenue has filed the present appeal.

2. I have heard Md:Altaf, A.R. appearing for the Revenue and Shri Pratech Dawar, ld.Advocate appearing for the Respondent, who seeks an adjournment. As I find no justifiable reason for adjournment of the matter, I proceed to hear the Revenue's appeal on the basis of the records.

3. The respondent is engaged in the manufacture of gutkha and Central Excise Officers seized the respondents' branded gutkha from

four different places. Inasmuch as the owner of the said place, could not produce the requisite duty paid documents in respect of the said seized gutkha, Revenue entertained a view that the same was cleared clandestinely by the respondent manufacturer. Accordingly, proceedings were initiated resulting in passing of an order by the original adjudicating authority confiscating the seized goods, confirming demand of duty and imposition of penalty.

4. The said of the original adjudicating authority was put to challenge by the respondents and the Commissioner (Appeals) by taking note of the various evidences on record, set aside the order impugned before him and allowed the appeal. Hence the present appeal by the Revenue.

5. For better appreciation, the reasons adopted by the Commissioner (Appeals) for allowing the appeal are being reproduced below :

> *"I have gone through the panchanama wherein the quality of gutkha has been mentioned as rejected. Further in his statemnte dated 10.04.07 Shri Agnihotri has admitted that the said goods which were rejected by purchaser were lying at his residence and some rejection occurred during packing of the material. I am of the opinion that if the goods once cleared on payment of duty and the same has been rejected by purchaser on quality basis and are kept somewhere are not clandestinely removed goods.*
>
> *So in short I can summarize that department have confiscated the goods at above referred because they were not covered by any duty paying documents. On the other*

*hand appellant's contention that the appellant were effecting sale ex-factory gate & the appellant had also stated that the appellant never facilitated transport of goods from the factory to any Transport Company or Railway Booking Office. It was specifically affirmed with corroborative evidence that it was the sole responsibility of consignee who use to purchase the goods at ex factory gate of transporter or carry it on its own account.*

*I find force in the contention of the appellant that if appellant had clandestinely cleared such huge quantity of finished goods on 15.03.07 which were seized at different locations then there must be shortage of finished goods then the recorded balance of the appellant. It is not the instant case contrary to department's findings. A negligible quantity of finished goods (191 bundle valued at Rs. 11460/-) were found in excess then the recorded balance of appellant.*

*The cases of clandestine removal should also been supported by cash flow. It is on the record that 27.80 lacs were seized during search considering it sale proceed of clandestinely removed goods. However during the course of investigation the appellant explained the possession of cash with documentary evidences and the same were released to the appellant.*

*Further it is noticed that both the transporters have stated that they had always transported the goods along with the bills which prove bonafide nature of the goods and further they have stated that freight were born by the consignee which again strengthen the contention of the appellant that they have affected the sale at factory gate. As regards Railway Station is concerned the goods were booked in the name of third party and appellant had not taken provisional release of the goods seized at the*

*Railway Station. In the case of Kothari pouches Ltd. & Anr. Vs. CCE, New Delhi 2000(41) RLT 209 (CEGAT) it has been held that evidence allegation based on transporter's records showing booking of the goods alleged to have been removed clandestinely- no other evidence- clandestine removal not established.*

*Thus in the light of above findings, I am of the view that the department have failed to produce any corroborative evidences related to clandestine removal. On the other hand no major discrepancies in the stock of finished goods were detected during search, no proof of flow back of cash, statement of transporters that they had booked the consignment of shyam bahar gutkha on bill freight were born by consignee, the goods seized at Railway Stations was booked in the name of Rakesh Verma and appellant did not take provisional release of the goods seized at Railway Station and finally appellant had never accepted clandestine removal of the said goods are in favour of appellant".*

6. Revenue in their memo of appeal, have nowhere improved upon the evidences, which stand considered by the Appellate Authority as insufficient. ~~He~~ It does not require reference to any decision of the High Court to observe that allegations and findings of the clandestine removal require production of evidences to establish so beyond doubt. The findings cannot be arrived at on the basis of assumption and presumption and require~~d~~ tangible and positive evidence, No such evidence stands produced by the Revenue, thus, requiring no

interference in the impugned order of the Commissioner (Appeals. Accordingly, Revenue's appeal is rejected.

Dictated and pronounced in the open Court

Sd/-
(Archana Wadhawa)
Member(Judicial)

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