FAX : 0532-2400149

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/71151/2017-EX[DB] dated 08/08/2017

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/ROA/70077/2017	E/2978/2006	ASIAN FERTILIZERS LTD. 23,CIVIL LINES,GORAKHPUR,(UP)
			Name and Address of Respondent
2			-C.C.E Allahabad 38,M.G.Marg, civil Lines, Allahabad

Copy To

3 Advocate(s) / Consultant(s):

KAPIL VAISH,CA
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,Ist 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 & SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH : ALLAHABAD
COURT No. I

APPEAL No. E/2978/2006-EX[DB] With
ROA Application No. E/ROA/70077/2017

(Arising out of Order-in-Appeal No. 81/CE/ALLD/2006 dated 11/07/2006 passed by Commissioner of Central Excise & Customs (Appeals), Allahabad)

M/s Asian Fertilizers Ltd. **Appellant**

Vs.

Commissioner of Central Excise, Allahabad **Respondent**

Appearance:

Shri Kapil Vaish, Chartered Accountant, for Appellant
Shri Pawan Kumar Singh, Superintendent (AR), for Respondent

CORAM:

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

Date of Hearing & Date of Decision : 08/08/2017

FINAL ORDER NO. 71151/2017..........

Per: Anil Choudhary

Heard the parties on the application for restoration of appeal. It has been explained by the ld. Counsel appearing for the appellant/applicant that the appeal was dismissed for non-prosecution due to non-appearance of the Counsel on record, who had been duly instructed to appear. It is further explained that the appeal was properly being pursued by the appellant and they had engaged advocate for appearing in the matter; only for the non-appearance of the said advocate on the date fixed for hearing ,the appellant should not be made to suffer and accordingly, it is prayed for restoration of the appeal.

2. From the perusal of the order sheet, we find that nobody appeared for the appellant on the previous dates 01/10/2016, 17/08/2016, 30/06/2016, 11/05/2016, when the matter was fixed for hearing before this Bench. However, in the interest of Justice we restore the appeal to its original number as the Counsel present for the appellant today is a new Counsel and is ready to argue the matter on merits.

3. Heard the parties on merits.

4. The brief facts of the case relevant for this appeal is that the appellants are engaged in the manufacture and clearance of Sulphuric Acid and Fertilizer falling under chapter Heading No. 2807 and 3103 respectively of the First Schedule to the Central Excise Tariff Act, 1985. Vide letter dated 01/04/2003, the appellant intimated that they would be availing the benefit of SSI Exemption Notification No. 8/2003-CE dated 01/03/2003 and that the value of clearances of Sulphuric Acid during the preceding financial year was Rs.1,42,04,003/-. On enquiry by the Department, the appellant informed vide letter dated 14/07/2003 that during the preceding financial year, they had also cleared fertilizer valued at Rs.7,03,69,036/-. As such the total value of clearances of all excisable goods in the preceding financial year 2002-03 was amounting to Rs.8,45,73,039/- and therefore, the appellants were not eligible for the benefit of

Notification No. 08/2003-CE dated 01/03/2003 since the benefit of full exemption under this Notification could be availed only if the total clearances of all excisable goods in the preceding financial year did not exceed Rs. 3 Crores. Thus, the appellants were alleged to have not paid duty of Rs.9,15,063/- on the clearance value of Rs.57,19,147/- during April, 2003 to June, 2003. Accordingly, vide Show Cause Notice dated 04/08/2003, the appellants were required to show cause as to why the duty of Rs.9,15,063/- should not be recovered from them under Section 11A(1) of the Act alongwith interest as applicable and as to why penalty should not be imposed upon them under Rule 25 of the Central Excise Rules, 2002 for violation of Rule 4 & 8 ibid. The Show Cause Notice culminated into Order-in-Original No. MP(Dem-29/2004) 23 of 2004 dated 31/03/2004 whereby the duty of Rs.9,15,063/- was confirmed and penalty of equivalent amount was imposed and applicable interest under Section 11AB of the Central Excise Act, 1944 was ordered to be recovered from the appellants.

5. This is the second round of litigation, in the earlier round, this Tribunal vide Final Order No. 381/05-B dated 05/04/2005, remanded the matter back to the Original Adjudicating Authority with the directions that while the confirmation of duty was being upheld, the duty should be re-quantified on cum-duty price basis, in view of the ruling in the case of CCE *Versus* Maruti Udyog Ltd. 2002 (141) E.L.T. 3

and the penalty aspect should be decided keeping in view the contention of the appellants that they had acted in a *bona-fide* manner. Accordingly, in the second round, vide Order-in-Original dated 30/12/2005, the Joint Commissioner reduced amount of duty to Rs.7,88,848/- after giving the cum-duty benefit and further equivalent penalty under Rule 25 of CER, 2002 was imposed. Thereafter the appellant preferred appeal before ld. Commissioner (Appeals) who have been pleased to record a finding that there is no contumacious conduct or *mala-fide* on the part of the appellant. Thereafter, taking lenient view have been pleased to reduce the penalty to Rs.5,00,000/-.

6. Being aggrieved, the ld. counsel for the appellant urges that in view of the categorical finding of the ld. Commissioner (Appeals) that there is no *mala-fide* in the matter and the issue being wholly interpretational, the retention of part of the penalty is bad and against the provisions of Section 11AC read with Rule 25 of the CER, 2002. The ld. counsel also relies on a ruling of Single Member Bench of this Tribunal in the case of N. S. Engineering Company Pvt. Ltd. *Versus* CCE reported at 2010 (262) E.L.T. 903 (Tri. – Bangalore), wherein under similar facts and circumstances, the penalty imposed was set aside by the tribunal.

7. Heard the ld. A.R. for Revenue, who has relied on the impugned order.

8. Having considered the rival contentions and on perusal

of the facts on record, we find that Rule 25 of CER, 2002 provides for penalty, subject to the provisions of Section 11AC of the Act, if any producer, manufacturer, etc. – (a) removes any excisable goods in contravention of any provisions of the Rules or the Notifications issued under these rules or (b) does not account for any excisable goods produced or manufactured or stored by him, or (c) engages in the manufacture, production or storage of any excisable goods without having applied for the registration certificate required under Section 6 of the Act, or (d) contravenes any of the provisions of these Rules or the Notifications issued under these Rules with intent to evade payment of duty, then in all such cases the goods shall be liable to confiscation and the producer or manufacturer, as the case may be, shall be liable to penalty not exceeding the duty on the excisable goods in respect of which any contravention of the nature referred to in clause (a) and (b) has been committed.

9. We find from perusal of the said Show Cause Notice that there is no case of any suppression or clearance of goods without proper maintenance of record. Further, there is no proposal of any confiscation of any goods in the show cause notice. Thus, we hold that the elements or the condition precedent for imposing penalty under Rule 25 are not obtaining in the facts of the present case. Accordingly, we set aside the penalty as retained by the ld. Commissioner (Appeals) in the impugned order. Thus, the appeal is allowed

with consequential benefits to the appellant. The ROA Application also stands allowed as abovementioned.

(Dictated & Pronounced in Court)

-Sd/-
(ANIL G. SHAKKARWAR)
Member (TECHNICAL)

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

Ansari

प्रमाणित प्रति/Certified True Copy
11/10/17
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