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

Dated: 28/02/2018

To

Appellant as per address in table below

Respondent as per address in table below

Final Order No. A/70409/2018-EX[DB] dated 08/01/2018

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/CROSS/50414/2015	E/51247/2014	**Commissioner CUSTOMS Central EXCISE and SERVICE TAX-Noida** C-56/42...SECTOR 62, NOIDA, UTTAR PRADESH 201307
			Name and Address of Respondent
2			Delta Factors I P Ltd C-459,sector-10,, NOIDA ,U.P

Copy To

3 Bar Association, CESTAT, Allahabad

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

5 M/s Centax Publications Pvt. Ltd., 1512-B, Bhishm Pitamah Marg, Opp ICICI Bank of Defence Colony New Delhi-3

6 Company Law Institute of India Pvt. Ltd., No.2 (old no.36), Vaithyaram Street, T. Nagar, Chennai-17

7 Taxmann Allied Service Pvt. Ltd., 59/32, New Rohtak Road, New Delhi-110005

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

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

10 Mark Professional Services Pvt. Ltd., 108, Everest Block, Aditya Enclave, Hyderabad – 38

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

12 M/S Knowledge Processing Pvt. ltd.(taxmanagementindia.com),FF-19,1st Floor,Cross River Mall,CBD Ground,Near Karkardooma Court,Delhi-110032

13 C.D.R. 14 Office Copy 15 Second Folder Copy 16 Guard File

Asstt. Registrar

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

APPEAL No. E/51247/2014-EX [DB] with E/Cross/50414/2015

(Arising out of Order-in-Appeal No. EXCUS/000/APPL/13/156 dated 30.07.2013 passed by Commissioner (Appeals), Customs, Central Excise & Service Tax, Noida)

CC&CE&ST, Noida Appellant

Vs.

M/s Delta Factors India Pvt. Ltd. Respondent

Appearance:

Sh. Pradeep Kumar Dubey, AR for Appellant

None for Respondent-assessee

CORAM:

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

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

Date of Hearing/decision : 08/01/2018

FINAL ORDER NO-70409/2018.......

Per: Archana Wadhwa

Being aggrieved with the order passed by the Commissioner (Appeals) vide which, while upholding demand of duty, he has set aside the penalty imposed upon the respondent, Revenue has filed the present appeal. We have heard Sh. Pradeep Kumar Dubey, ld. AR appearing for the Revenue. Nobody appeared for the respondent-assessee.

2. As per facts on record, a team of Anti-Evasion Branch of Noida visited the premises of the party on 09.09.2010. During the course of checking, it was noticed that the unit had cleared finished goods valued at Rs. 1,09,83,729/-,

during the period from December, 2009 to August, 2010 under Deemed Exports, to Hotels against Authorizations under EPCG Scheme, without discharge of duty obligations. Further, it was also noticed that Cenvat credit amounting to Rs. 73,391/- was availed by the party on the four invoices issued by M/s Mardia Alloys, during May & June 2006, against invoices issued by M/s V.K. Metals, Jammu who had issued fake invoices without being engaged in any manufacturing activity and physical clearance of finished goods shown in the invoices issued by them, as detected by DGCEI, New Delhi.

2.1 Further scrutiny of documents revealed that party cleared finished goods valued at Rs. 1,05,45,148/- during December, 2009 to August, 2010 under Deemed Exports, to hotels/customers reportedly having EPCG Authorisation under SFIS, without payment of appropriate Central excise duty, whereas prior to December, 2009 they had been paying duty on such clearances under Deemed Export. On being detected and pointed out by the Departmental officers, the party paid Central Excise duty on the goods cleared to Hotels having EPCG Authorization.

2.2 In view of above, a Show Cause Notice dated 24.01.2012 has been issued to the party as to why:-

a) Central Excise duty and interest amounting to Rs. 10,83,887/- should not be demanded from them under Section 11 A of Central Excise Act, 1944 by invoking extended period as provided therein. Since the above mentioned amount has already been deposited by them, why the same should not be appropriated.

b) Cenvat credit amounting to Rs. 73,391/- availed by them on the basis of ineligible invoices issued by M/s Mardia Alloys Delhi should not be denied to them. As the above mentioned amount has already been reversed/deposited by them, why the same should not be appropriated.

c) Interest at the applicable rates on the cenvat credit of Rs. 73,391/- should not demanded as applicable during the relevant time.

d) Penalty should not be imposed under Section 11AC of the Central Excise Act, 1944 and rule Rule 15 of Cenvat Credit Rules, 2004.

2.3 The above Show Cause Notice was adjudicated vide impugned order under which demand of Central Excise Duty Rs. 10,55,734/-, demand of Cenvat credit 73,391/- along with interest confirmed, besides imposing penalty of Rs. 11,29,125/-. The amount of demand of duty Rs. 10,55,734/- and interest Rs. 28,153/- against demand and amount of Cenvat credit Rs. 73,391/- was already deposited hence the same has been ordered for appropriation against the demand of duty, interest and Cenvat credit.

2.4 Being aggrieved by the impugned order, the party has filed the anappeal before Commissioner (Appeals) and Commissioner (Appeals) Noida after going through the facts of the case, has observed as under:-

> *"The appellants have submitted copies of invalidation letter, issued by the Regional Authority, naming the appellant as supplier and against which the appellant have claimed to clear the impugned goods. The Chapter 8 of the FTP, stipulates that the benefit of deemed export under the EPCG Scheme will be given to such clearances by the Ministry of Commerce. Notifications are issued to extend the duty exemption benefit of Central Excise duty in respect of deemed export, but I do not find any Central Excise Notification providing exemption on the goods supplied to EPCG authorization holders such exemption cannot be extended in the case."*

2.5 Therefore, the Commissioner (Appeals) concluded that the adjudicating authority has correctly confirmed demand of Central Excise duty on the goods in question supplied to EPCG authorization holder.

2.6 As regard goods supplied under SFIS scheme, the Commissioner (Appeals) observed as under:-

> *"From the case record and documents available on record as well as submitted by the appellants, I observe that neither such certificate issued by the Regional Authority was produced before the jurisdictional Central Excise Officer, nor at the time of adjudication. The appellants have also not submitted copies of certificate confirming installation and use of goods in the factory or premises of the holder of the said certificate. In view of the above facts and circumstances, I reached on the conclusion that the appellants have not complied with the condition stipulated under said notification 34/2006 to the Hotels under SFIS are not entitled for exemption from duty. In view of the above facts, I uphold the order of the adjudicating authority upholding the demand of Central Excise duty of Rs. 11,29,125/- along with interest."*

2.7 Further as regard imposition of penalty under Section 11AC, the Commissioner (Appeals) observed that the appellant had already paid the Central Excise duty with interest before issuance of the Show Cause Notice, the Section 11 A(2) of the Act clearly gives benefit to the assessee in such a situation. Accordingly, the Commissioner (Appeals) opined that the provision of Section 11A(2) of the Central Excise Act, 1944 are squarely applicable in the present case.

2.8 Accordingly Commissioner (A) had modified the impugned OIO dated 12.3.2013 to the extent of dropping the penalty of Rs. 11,29,125/- imposed under Rule 15 of the Cenvat Credit Rules, 2004 read with Section 11 AC of the Central Excise Act, 1944.

3. While upholding the demand Commissioner (Appeals) he has set aside the penalty on the ground that the duties were deposited by the appellant before the issuance of the show cause notice. Revenue on the other hand has contended that the fact of reversal prior to the show cause notice cannot be adopted as a ground for setting aside the penalties, inasmuch as the issue involved suppression and wilful mis-statement, in which case the provisions of Section 11A(ii) were not applicable.

4. Though, we note that the penalty could not have been set aside strictly on the above ground but we are of the view that the issue involved was a bonafide issue of interpretation of provision of law. The respondent have submitted copies of invalidation letter issued by the original authorities and entertained a view that the EPCG scheme will be applicable to such clearances. Similarly, in respect of the clearances made to hotels, the issue involved interpretation of Notification No. 34/2006. As such, it is not a case of any malafide on the part of the respondent, thus justifiably calling for any imposition of penalty. As such, we are of the view that setting aside of the penalties by Commissioner (Appeals) cannot be faulted upon. Accordingly, Revenue's appeal is rejected.

(Operative part of the order pronounced in the open Court)

Sd/-
Anil.G. Shakkarwar
Member(Technical)

Sd/-
(Archana Wadhawa)
Member (Judicial)

Pant

प्रमाणित प्रति/Certified True Copy
13/03/18
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