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: 06/02/2018

To

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

Final Order No. A/70295/2018-SM[BR] dated 30/01/2018

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/56647/2013 | **Commissioner of Customs, Central Excise and Service Tax-Allahabad**<br>38...M G MARG...<br>CIVIL LINES,<br>ALLAHABAD,<br>UTTAR PRADESH<br>211001 |
| | | Name and Address of Respondent |
| 2 | | Surya Industries<br>Vikash Nagar, Argadwa,,,<br>GORAKHPUR<br>(U.P.) |

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

**KAPIL VAISH (Advocate)**
**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, 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 & SERVICE TAX APPELLATE TRIBUNAL

REGIONAL BENCH : ALLAHABAD
COURT No. I

APPEAL No.E/56647/2013-EX[SM]

(Arising out of Order-in-Appeal No. 72-74/CE/Alld/2012 dated 20/12/2012 passed by Commissioner of Central Excise & Customs (Appeals), Allahabad)

**Commissioner of Central Excise, Allahabad** **Appellant**

Vs.

**M/s Surya Industries,** **Respondent**

Appearance:

Shri Sandeep Kumar Singh, Deputy Commissioner (AR) for Appellant
Shri Kapil Vaish, Chartered Accountant, for Respondent

**CORAM:**

**Hon'ble Mr. Anil Choudhary, Member (Judicial)**

Date of Hearing : 30/01/2018
Date of Decision : 30/01/2018

FINAL ORDER NO.-70225/2018.........

**Per: Anil Choudhary**

The present appeal by the Revenue is directed against Order-in-Appeal No. 72-74/CE/Alld/2012 dated 20/12/2012 passed by Commissioner of Central Excise & Customs (Appeals), Allahabad.

2. The brief facts of the case are that respondents, a partnership firm were engaged in the manufacture of Poly Propylene Glasses falling under Chapter Heading No.39241090 of the Central Excise Tariff Act, 1985. They had

availed value based exemption for Small Scale Industries in terms of Notification No.08/2003-CE. On 29.04.2009 the officers of Central Excise visited the factory premises of respondent and physical verification of the stock of finished goods and raw material was done, which was found to be correct. The officers resumed some records and some statements were also recorded. On examination of the records by the Central Excise officers, it was revealed that the electricity consumption in the appellant's factory was dis-proportionate to the production of the goods recorded in books. On the basis of investigation and statements, a show cause notice dated 26.04.2010 was issued alleging that the respondents had not obtained registration under Central Excise Rules and it appeared to revenue that respondents had suppressed their production and clearance of plastic disposable glasses, with an intention to evade payment of duty and therefore proviso to Section 11A (1) is invokable. In the said show cause notice, revenue proposed to demand Central Excise duty amounting to Rs.34,74,527/- under Section 11 A (1) of the Central Excise Act, 1944 along with interest under Section 11 AB of the Act and further there was proposal to impose penalty on the respondents under Section 11 AC of the Act read with Rule 25 of the Central Excise Rules, 2002. The said SCN was adjudicated through the Order-in-Original dated 30.03.2012 wherein Original authority reduced the demand to Rs.17,37,623/- and imposed equal penalty. Penalty of Rs.5,000/- was also imposed on a partner of firm.

3. Aggrieved by the said order, respondent-assessee preferred appeal before learned Commissioner (Appeals) and Department also preferred appeal on the issue of reduction on demand of duty. Partner of ~~law~~ firm also filed appeal to Commissioner (Appeals). The learned Commissioner (Appeals) has disposed of all the appeals by a common Order-in-Appeal wherein in para 6.1 he observed, as under:-

> *6.1 Regarding first issue, I find that total production for the year 2007-08 to 2009-10 has been calculated by the department on the basis of average consumption of electricity used for production of finished goods per kilogram. I also find that there is nothing on the record to suggest if any excess raw material or finished goods were found in the store at the time of checking. There is also no evidence on the record to suggest the clandestine receipt of the raw material from various buyers and sale of the finished goods to different persons during the period in dispute by the appellants. No discrepancy in the ER-1 returns, which were regularly filed by the appellants, was detected by the Excise Department. No seizure of the finished goods supplied to any customers in a clandestine manner, without payment of duty took place. No statement of any buyer of having received the goods from the appellants in a clandestine manner was recorded during investigation. In the absence of all these circumstances, it could not be concluded simply on the basis of the consumption of the electricity that there had been clandestine manufacture and removal of the goods by the appellants during the period in question. The estimated production on the basis of higher consumption of electricity is an estimate only which may reflects due to other factors such as low voltage of supply, frequent power tripping etc, which may result in higher electricity consumption and wastage of raw material. Hence, the*

*total production for the three years calculated on the basis of average consumption of electricity can be national. I, therefore, hold that in the absence of any documentary proof, that the goods estimated to be produced and not brought on record were removed without payment of duty, demand for duty on such estimated goods cannot be confirmed. I also observe that the statements taken from the machine operators merely refers to consumption of raw materials for production of finished goods in a day as well as time required for manufacture of sheets. Nothing has been suggested in the statements of the machine operators and the statement of the partner off firm that the excess finished goods were manufactured and removed clandestinely from the factory without payment of duty. In the absence of any documentary evidence, I hold that clandestine removal off goods is not proved and, therefore, the demand of duty on this issue is not maintainable in law. It is a settled law that no lawful conclusion could be arrived as there was excess production and clandestine removal, of the goods by the appellants for want of corroboration from any other source."*

4. Further, learned Commissioner (Appeals) also relied various ruling of this Tribunal and High Court including the ruling of Hon'ble Allahabad High Court in the case of Commissioner of Central Excise, Meerut-I Vs R.A. Castings Pvt. Ltd. reported at 2011 (269) ELT 337 (All.). He further set aside the entire demand and penalty on assessee as well as partner. Aggrieved by the said order, revenue preferred appeal before this Tribunal.

5. Learned A.R. for revenue has relied on the decision of original authority and reiterated the grounds of appeal.

6. Learned Counsel for respondent has reiterated the findings of learned Commissioner (Appeals) and contended

that there is absolutely no evidence of clandestine manufacture or clearance of final products. He submits that the entire proceedings including the present grounds of appeal proposed to raise the demand on the basis of electricity consumption. He further, submitted that it is a settled law that only on the basis of electricity consumption Central Excise duty cannot be demanded. He placed reliance on the ruling of Hon'ble Allahabad High Court in the case of Commissioner of Central Excise, Meerut-I Vs R.A. Castings Pvt. Ltd. (supra).

7. Considering the rival submissions made by both sides, I find that the department has filed the appeal only on the ground of excess electricity consumption. I find that this issue is no more res-integra. By now it is the settled law that excise duty cannot be demanded on the basis of excess electricity consumption.

8. In this connection, I also refer the decision of Hon'ble Allahabad High Court in the decision of R.A. Castings (supra), where in Hon'ble High Court has held-"*Mere electricity consumption cannot be the only basis for determining duty liability*". The said judgment of Hon'ble High Court has been affirmed by the Hon'ble Supreme Court reported at 2011 (269) ELT. A108 (S.C.).

Asn

9. In view of the above I hold that there is no infirmity in the impugned Order-in-Appeal passed by the learned Commissioner (Appeals).

10. Accordingly, the appeal filed by revenue is dismissed.

(Dictated in Court)

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

*akp*

प्रमाणित प्रति/Certified True Copy
27/02/18
सहायक पंजीकार/Assit. 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