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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066
EXCISE APPEAL BRANCH

Appeal No. E/94 /2005 - EX[DB] Date 02/12/2009

Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
M/S FAIBANKS MORSE INDIA LTD.
28 SIDE-IV,INDUSTRIAL AREA SAHIBABAD
GHAZIABAD

M/S FAIBANKS MORSE INDIA LTD. Appellant
Vs
C.C.E. GHAZIABAD Respondent

I am directed to transmit herewith a certified copy of **Final order No.** 1267/ **2009 EX[DB]** dated 11-11-09 passed by the Tribunal under Section 35-C(1)of Central Excises Act, 1944

Assistant Registrar
(Excise Appeal Branch)

Copy to :
1. Respondent
   C.C.E. GHAZIABAD
   C.G. O. COMPLEX-II, KAMLA NEHRU NAGAR, GHAZIABAD 201302
2. Adv. / Consult
   MR.V. LAXMIKUMARAN
   B-6/10, SAFDARJUNG ENCLAVE, NEW DELHI-110029

3 C.D.R
~~4 J.C.D.R.~~
5 Bar association, CESTAT, New Delhi
6 Director Publications, Customs, Excise. I.P. Estate, New Delhi
7 M/s Centax Publictions Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi - 3
8 Commercial Laws of India Pvt Ltd. Post Bag No. 1033, No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
9 Raghuraman's 44-B, Regal Flat,Shipra Suncity, Indirapuram - 201010,Ghaziabad, DT, U.P.
10 M/s Manupatra Information Solutions Pvt Ltd. Excise & Customs Cases B-37, Sector - 1, Noida - 201301, Gautam Budh Nagar, (UP)
11 M/s. Deeparchie Publications, M-93, Marg. 46, Saket, New Delhi 110017
12 Taxindiaonline.com Pvt.Ltd, B-XI/8183,Vasant Kunj, New Delhi - 110070
13 Taxmann Allied Service Pvt Ltd., 21/35, West Punjabi Bagh, New Delhi - 110026
14 Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road,Ahmedabad-15
15 LAWCRUX Advisors Pvt Ltd, LAW House,1-8,Sector - 10, Faridabad 121003 (Haryana)
16 Office Copy
17 Guard file
18. HON'BLE PRESIDENT.

Assistant Registrar
(Excise Appeal Branch)

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
WEST BLOCK NO. 2, R.K. PURAM, NEW DELHI

COURT – I

Date of hearing/decision: 11th November, 2009

Central Excise Appeal No. 94 of 2005

[Arising out of Order-in-Appeal No. 15/CE/GZB/2004 dated 08.10.2004 passed by the Commissioner of Central Excise (Appeals), Ghaziabad]

For approval and signature:

Hon'ble Justice R.M.S. Khandeparkar, President;
Hon'ble Shri Rakesh Kumar, Member (Technical)

1.	Whether Press Reporters may be allowed to see the order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	Yes
2.	Whether it would be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	No
3.	Whether their Lordships wish to see the fair copy of the order?	Seen
4.	Whether order is to be circulated to the Departmental authorities?	Y

M/s. Fairbanks Morse India Ltd.,
Appellant

Vs.

CCE, Ghaziabad
Respondent

Appearance:

Shri B.L. Narasimhan, Advocate for the appellant/applicant;
Shri A. Khanna, Authorized Departmental Representative (DR) for the Revenue

Coram:

Hon'ble Justice R.M.S. Khandeparker, President
Hon'ble Shri Rakesh Kumar, Member (Technical)

Final **ORAL ORDER NO.** 1267/09-EX **dated** ________

Per Justice R.M.S. Khandeparkar:

Heard learned Advocate for the appellants and learned D.R. for the respondents.

2. The appeal arises from the order dated 8.10.2004 passed by the Commissioner (Appeals), Ghaziabad. By the impugned order the Commissioner (Appeals) dismissed the appeal filed by the appellants against the order passed by the adjudicating authority. The Jt. Commissioner, Ghaziabad by his order dated 27.2.2004 had confirmed the demand of duty amounting to Rs. 6,52,202/- along with interest thereon and have imposed penalty of Rs. 1 lakh against the appellants. The Commissioner (Appeals) while observing that the matter involve the issue which was already decided in appellants case itself for the earlier period by the Commissioner (Appeals) on 26.9.2003, and for the same reason the present appeal was also liable to be dismissed.

3. Learned Advocate for the appellants while fairly conceding that the previous appeal filed by the appellants before the Tribunal has been dismissed which has been reported at 2006 (197) ELT 81 (Tri.-Del.), submitted that on the same ground the present appeal is also liable to be

disposed off. However, as regards the penalty imposed against the appellants, the same is liable to be set aside, as the impugned order as well as order passed by the adjudicating authority nowhere disclose any intention on the part of the appellants to evade duty so as to warrant imposition of penalty. Reliance is placed in the decision of the Apex Court in the matter of UOI vs. Rajasthan Spg. & Wvg. Mills Ltd., reported in 2009 (238) ELT 3 (S.C.). On the other hand, learned D.R. submits that in the facts and circumstances of the case, apart from dismissing the appeal, there is no case for passing order regarding penalty.

4. The appellants are engaged in the manufacture of P.D. Pumps of Vertical Tubine Pumps which are exempt from duty. However, parts of such P.D. Pumps namely, Bowl Assembly, Column and Shaft Assembly and Discharge Head Assembly which are chargeable to central excise duty. However, the appellants on assumption that those parts were integral parts of P.D. Pump cleared the same without payment of duty. A show cause notice, in this regard, for the period July, 2001 to February, 2002 came to be issued and was adjudicated upon by the Jt. Commissioner, Ghaziabad as stated above.

5. Perusal of the order in the case of Fairbanks Morse India Ltd. vs. CCE, Ghaziabad, reported in 2006 (197) ELT 81 (Tri.-Del.), discloses that the issue sought to be raised in the matter is fully covered by the said decision. The only difference is that the same is related to the period

different from the one involved in the matter in hand. As far as the merits of the case are is concerned, the matter is fully covered by the said decision. On that ground alone, the appeal is liable to be dismissed. As regards imposition of penalty is concerned, undoubtedly, the order passed by the adjudicating authority discloses that the show cause notice was issued requiring the appellants to satisfy as to why penalty should not be imposed under Rule 25 of the Central Excise Rules, 2002. However, while imposing the penalty the adjudicating authority has not referred to any provision of law as such to justify the penalty of Rs. 1 lakh.

6. The Apex Court in Rajasthan Spg. & Wvg. Mills case after taking note of the UOI vs. Dharamendra Textile Processors, reported in 2008 (291) ELT 3 (S.C.) ruled that "in other words the conditions that would extend the normal period of one year to 5 years would also attract imposition of penalty. It, therefore, follows that if the notice under Section 11A (1) states that the escaped duty was the result of any conscious and deliberate wrong doing and in the order passed under Section 11A(2) there is a legally tenable finding to that effect then the provision of Section 11AC would also get attracted. The converse of this, equally true, is that in the absence of such an allegation in the notice the period for which the escaped duty may be reclaimed would be confined to one year and in the absence of such a finding in the order passed under Section 11A(2) there would be no application of the penalty provision in Section 11AC of the Act. .... The penalty provision

of Section 11AC would come into play only after an order is passed under Section 11A(2) with the finding that the escaped duty was the result of deception by the assessee by adopting a means as indicated in Section 11AC." Undoubtedly, the decision was with reference to Section 11AC of the Central Excise Act, 1944.

7. As far as Rule 25 of the said Rules is concerned the same reads as under:-

"**RULE 25. Confiscation and penalty**. – (1) Subject to the provisions of section 11AC of the Act, if any producer, manufacturer, registered person of a warehouse or a registered dealer, -

(a) removes any excisable goods in contravention of any of the provisions of these 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) engage 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, all such goods shall be liable to confiscation and the producer or manufacturer or registered person of the warehouse or a registered dealer, as the case may be, shall be liable to a penalty not exceeding the duty on the excisable goods in respect of which any contravention of the nature referred to in clause (a) or clause (b) or clause (c) or clause (d) has been committed, or [rupees two thousand], whichever is greater."

Perusal of the impugned order reveals that the adjudicating authority nowhere discloses any reason which would reveal ingredient of any of the clauses of Rule 25(1) so as to justify the imposition of penalty in the matter in hand. The facts on record also do not disclose any intention to evade the payment of duty nor any of the ingredients of Section 11AC. Being so the penalty is liable to be set aside.

8. For the reasons stated above, the appeal partly succeeds. The appeal, so far as it relates to merits of the case, the same is dismissed for the reasons mentioned above. The appeal, so far as it relates to penalty, it succeeds. Appeal stands disposed off in above terms.

(Justice R.M.S. Khandeparkar)
President

(Rakesh Kumar)
Member (Technical)

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