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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/101-102/2006-SM[BR]

Date 07/01/2008

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

To :
M/S NIKHIL FOOTWEARS LTD.
52-53, HSIDC INDL AREA KONDLI
2, MR. RAJIV SINHA
52-53, HSIDC INDL AREA KONDLI[HR]

M/S NIKHIL FOOTWEARS LTD.

C.E. ROHTAK
Vs
Respondent

I am directed to transmit herewith a certified copy of Final order No. 1-2/2008-SM[BR] dated 14.11.2007
passed by the Tribunal under Section 35-C(1) of Central Excises Act, 1944

Assistant Registrar
(Excise Appeal Branch)

Copy to :

1. Respondent

C.E. ROHTAK

SCO NO.6 SECTOR 1, ROHTAK.

2. Adv. / Consult

MR.NAVIN MALIK

B-388, MERA BAGH, NEW DELHI

3. S.D.R.

~~J.C.D.R.~~

5. Bar association, CESTAT, New Delhi
6. M/s. Deeparchi Publications, M-93, marg. 43, saket, New
7. M/s Centax Publications (P) Ltd, 1512-E, Bhisim Pitamah
8. Excise & Customs cases, B-37, Sector -1, NOIDA - 201301
9. R. Venkatraman Constt. 44-B, S. Suncity, Ghaziabad -
10. Nidheshak publications, I.P. Estate, new Delhi
11. Taxmann Allied Service Pvt Ltd, 21/35, West Punjabi Bagh,
12. Co, Law Institution
13. TAX INDIA, B-XI/8183, Vasant Kunj, New Delhi - 110070
14. Office Copy
15. Guard file

Assistant Registrar
(Excise Appeal Branch)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE
TRIBUNAL, R.K. PURAM, W.B. NO.2, PRINCIPAL BENCH
NEW DELHI, COURT NO. III**

Excise Appeal No. 101-102 of 2006 –SM (BR)

[Arising out of order in appeal No. 354-356/GRM/RTK/2005 dated 30.9.2005
passed by the Commissioner of Central Excise, Gurgaon]

Date of Hearing/ Decision: 14.11.2007

For approval and signature:

Hon'ble Mr. P.K. Das, Member (Judicial)

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- | | | |
|--|---|------|
| 1. Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982. | : | |
| 2. Whether it should 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? | : | |
| 4. Whether Order is to be circulated to the Departmental authorities? | : | |
-

Nikhil Footwears Ltd.,
Mr. Rajiv Sinha

Appellants

[Rep. by Mr. Naveen Mullick, Advocate]

Vs.

CCE, Rohtak

Respondent

[Rep. by Mr. S. Gautam, Authorized Representative (DR)]

CORAM: Mr. P.K. Das, Member (Judicial)

Final ORDER No. 1-2/08-SM(BR)

Per P.K. Das:

Common issue involved and therefore, both the appeals are taken up for hearing together for disposal.

2. Appellant No. 1 is engaged in the manufacture of footwear P.U. Sole etc. classifiable under sub heading 6401.02 of the Central Excise Tariff Act, 1985. On 18.2.2003, the Central Excise officers visited their factory and verified the stocks

of inputs. The officers detected shortage of inputs involving Central Excise duty of Rs.2,39,713/- which was voluntarily debited by the appellant No. 1 vide PLA entry No. 29 dated 19.2.2003. On scrutiny of the records it transpires that the appellant No. 1 removed inputs for processing which were not returned back within 180 days as required under Rule 4(5)(a) of Cenvat Credit Rules, 2002. The appellant debited the amount in RG-23A Pt.II Entry No. 2145 dated 18.2.2003. Shri Rajiv Sinha appellant No. 2 Senior Manager (Finance) of the appellant No. 1 admitted the shortage of the inputs. The adjudicating authority confirmed the demand of duty and appropriated the amount as already been deposited. He also imposed penalty of equal amount of duty under Section 11AC of the Central Excise Act, 1944 alongwith interest which has been debited by the appellant. A penalty of Rs. 20,000/- was imposed on the appellant No. 2 under Rule 26 of the Central Excise Rules, 2002. The appellants filed appeal against the adjudication order before the Commissioner (Appeals). Revenue also filed appeal before the Commissioner (Appeals) against adjudication order in so far as imposition of penalty in respect of removal of the goods for job work. Commissioner (Appeals) rejected the appeal of the appellant and allowed the appeal of the Revenue and imposed a penalty of Rs. 30,000/- under Rule 13 of Cenvat Credit Rules, 2002 upon the appellant No. 1.

3. The learned Advocate on behalf of the appellants submits that it is revealed from the panchnama, the appellant No. 2 failed to explain the alleged shortage as they have not conducted any stock verification for a long time. He submits the appellant in reply to the show cause notice explained that there was no shortage actually, the alleged shortage arose due to evaporation of the inputs for storage loss. He also submits ^{Shri} in the facts and circumstances of the case, the appellant deposited the duty before issue of the show cause notice and therefore no penalty should be imposed. He relied upon the following case laws.

- (i) CCE, Ludhiana vs. Sigma Steel-2007 (82) RLT 361 (P&H)
- (ii) CCE, Ludhiana vs. Pee Jay International -2007 (213) ELT 709 (Tri-Del)

4. The learned authorized representative (DR) reiterates the finding of the Commissioner (Appeals). He submits that the appellant failed to explain the reasons for shortage and therefore the charge of clandestine removal is appropriate.

5. After hearing both the sides and on perusal of the record, it is seen that the appellant in the statement dated 18.2.2003 admitted the shortage of inputs and also debited the duty voluntarily. The learned Advocate drew the attention of the bench in the panchnama dated 18.2.2003. It is revealed from the panchnama that as a result of physical verification of the inputs PVC compound and cyclonexamine were found short. On being asked, Shri Rajiv Sinha, appellant No. 2 admitted the said shortage and stated that they have not conducted the physical verification of the goods and was unable to explain the exact reasons for shortage. He also stated that he is willingly to pay the duty on shortage of Rs. 2,39,713/- in PLA on 19.2.2003. It is seen from the impugned order that in reply to show cause notice on 12.3.2004 the appellant explained the reasons for shortage. While agreeing with the finding of the Commissioner (Appeals) that the appellant admitted the shortage of the inputs on the spot, the demand of duty in respect of shortage of inputs is upheld.

6. Regarding the demand of duty for failure to return back the inputs cleared for job work within 180 days under Rule 4(5) (a) of the Cenvat Credit Rules, 2002, the learned Advocate has not seriously contested. I find the appellant is required to debit the duty if they fail to return back the job work material within the stipulated period. So, the demand of duty of Rs. 204902/- on the inputs cleared for job work is upheld.

7. Regarding the imposition of penalty, I find force in the submission of the learned Advocate. It is seen from the record that the shortage of inputs was detected during the stock verification. The appellant debited the duty immediately upon detection. The appellant also explained on the spot that they ^{have} ~~are~~ not

conducted the stock taking for a long time. The Tribunal in the case of Pee Jay International (supra) held that clandestine removal of inputs from factory was not proved and therefore, imposition of penalty under Section 11AC is not warranted. Further, the Hon'ble Punjab & Haryana High Court in the case of Sigma Steel Tubes (supra) held that penalty under Section 11AC of Central Excise Act, 1944 is not leviable when duty is paid before issue of show cause notice. In the present case, the appellant paid the duty on shortage of the inputs before issue of show cause notice and the penalty imposed under Section 11AC is set-aside. Regarding imposition of penalty under Rule 13 of the Cenvat Credit Rules on the inputs cleared for job work, I find that rule 13 of Cenvat Credit Rules, 2002 provides recovery of credit utilized wrongly. In the present case, the clearance of the duty paid inputs under Rule 4 was on record and therefore, there is no intention to evasion of duty. As such I do not find any reason to impose penalty. Accordingly, penalty imposed under Rule 13 is set-aside. Imposition of penalty on the appellant No. 2, I find that in his statement on the spot, he stated that he is the Manager (Finance) and he was not aware of the reasons of the shortage. So the imposition of penalty on the appellant No. 2 under Rule 26 of the Central Excise Rules, 2002 is not warranted and accordingly, set-aside. The appeal of the appellant No. 1 is disposed of in the above terms. Appeal of appellant No. 2 is allowed.

(Order dictated and pronounced in the open Court)

(P.K. Das)
Member (Judicial)

[Pant]