

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

Appeal No. E/73 /2007-SM[BR]

Date 25/08/2008

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

To :
C.C.E. KANPUR
117/7, SARVODAYA NAGAR, KANPUR
208005

C.C.E. KANPUR

M/S BEEKAY ENTERPRISES

Appellant

Vs

Respondent

I am directed to transmit herewith a certified copy of Final order No. 1193 / 2008-SM[BR] dated 18.8.2008
passed by the Tribunal under Section 35-C(1) of Central Excises Act, 1944


Assistant Registrar

(SM Appeal Branch)

Copy to :

1. Respondent

M/S BEEKAY ENTERPRISES

66-A, DADA NAGAR, KANPUR.

2. Adv. / Consult SHRI A.K. DIXIT ADV.

N/V;-----

3. S.D.R.

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

5. Bar association, CESTAT, New Delhi

6. M/s. Deeparchi Publications, M-93, Marg. 46, Saket, New Delhi 110017

7. M/s Centax Publications (P) Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi -

8. Excise & Customs cases, B-37, Sector -1, NOIDA - 201301 Gautam Budh Nagar, (U.P.)

9. Raghuraman's 44-B, Regal Flat, Shipra Suncity, Indirapuram - 201010, Ghaziabad, DT, U.P.

10. Nidheshak publications, I.P.Estate, new Delhi

11. Taxmann Allied Service Pvt Ltd., 21/35, West Punjabi Bagh, New Delhi - 110026

12. Commercial Laws of India Pvt Ltd Post Bag No. 1033, No.70(Old No. 88), Thyagaraya Road, T. Nagar, Chennai 60017

13. Taxindiaonline.com Pvt.Ltd, B-XI/8183, Vasant Kunj, New Delhi - 110070

14. Easy Service Tax Online Dot Com Pvt. Ltd. 407A, Iscon Mall, Above Star India Bazar, Satellite Road, Ahmedabad - 15

15. Office Copy

16. Guard file


Assistant Registrar
(SM Appeal Branch)

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

Excise Appeal No. 73 of 2007-SM

[Arising out of Order-in-Appeal No. 514-CE/APPL/KNP/2006 dated 19.10.2006
passed by the Commissioner (Appeals-I) Customs & Central Excise, Kanpur]

Date of Hearing/ decision: 18.08.2008

For approval and signature:

Hon'ble Mr. Justice S.N. Jha, President

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?	
3	Whether Their Lordships wish to see the fair copy of the Order?	
4	Whether Order is to be circulated to the Departmental authorities?	

CC&CE, Kanpur

Appellant

Vs.

M/s Beekay Enterprises

Respondent

Appearance:

Mr. R.K. Verma, Departmental Representative for the Appellant

Mr. A.K. Dixit, Advocate for the Respondent

CORAM: Mr. Justice S.N. Jha, President

final ORDER 1193/2007 SM(BR)

Per S.N. Jha:

This appeal by the Revenue is directed against the Order-in-Appeal of the Commissioner, Customs & Central Excise dated 10.10.2006 dismissing the Revenue's appeal directed against the Order-in-Original of the Assistant Commissioner dated 25.5.2005 declining to impose penalty on the respondent.

2. The appeal is thus limited to non-imposition of penalty. It may be mentioned here itself that penalty was not imposed on the premise that the respondent --assessee had paid the entire duty prior to issuance of the show cause

notice. While affirming the order of the Assistant Commissioner, the learned Commissioner placed reliance on the Larger Bench decision of the Tribunal in Machino Montel (I) Ltd., -2004 (168) ELT 466 (Tri-LB). He noticed that the decision of the Tribunal in the case of Rashtriya Ispat Nigam Limited vs. CCE-2003 (161) ELT 285 (T) on the issue of imposition of penalty where entire duty stands paid prior to issuance of show cause notice, was upheld by the Supreme Court by summarily dismissing the appeal of the Department vide 2004 (63) ELT A53 (SC).

3. Shri R.K. Verma appearing for the Revenue submitted that the decision of the Larger Bench in Machino Montel (I) Ltd. (supra) was set-aside by the Punjab & Haryana High Court vide 2006 (202) ELT 398 and, therefore, that could not be relied upon to reject the appeal. As regards the decision in Rashtriya Ispat Nigam Limited (supra), he pointed out that it was rendered prior to amendment in Section 11A by Act 14 of 2001 inserting sub-sections (2A) and (2B) therein. Shri Verma referred to the decision of the Delhi High Court in K.P. Pouches (P) Ltd., vs. UOI & Anr. -2008 (85) RLT 483 (Del.) in which it was held that when the entire duty is paid before issuance of show cause notice, penalty equal to 25% of duty is leviable and the adjudicating authority should give an option to the assessee to pay the penalty to the extent of 25%. Reliance was also placed on decision of the Bombay High Court in CCE&C, Aurangabad vs. Padmashri V.V. Patil S.S.K. Ltd., -2007 (215) ELT 23 (Bom.). In sum, the contention of the learned DR was that the Commissioner erred in declining to impose penalty even though the shortage of inputs was suggestive of clandestine removal thereof attracting Section 11A (2A) of the Central Excise Act.

4. On behalf of the respondent it was submitted that the appeal itself is not maintainable in view of the provisions of sub-section (2) of Section 35B of the Act. Counsel submitted that appeal can be filed only on the direction of Committee of Commissioners of Central Excise upon review of the impugned order but no such direction has been brought on record. On merit Counsel

submitted that the provision of Section 11AC can be applied only in cases of non payment or short payment duty by reason of fraud, collusion, wilful mis-statement or suppression of facts or contravention of any of the provisions with intent to evade payment of duty. In the instant case, there was no such allegation in the show cause notice as to any contravention with intent to evade payment of duty. The basic condition not being satisfied the authorities rightly declined to impose a penalty particularly when the respondent already paid entire duty before issuance of show cause notice. It was submitted that notwithstanding the decision in the case of Machino Montel (I) Ltd., it was held by the same High Court in Commissioner of Central Excise, Jalandhar vs. S.K. Sacks (P) Ltd., -2008 (226) ELT 38 (P&H), that where duty was paid before issuance of show cause notice, penalty was not imposable.

5. As regards the preliminary objection to the maintainability of the appeal Shri R.K. Verma produced before me the extracts from the relevant file containing notings of different authorities. He submitted that though no formal authorization as required under sub-section (2) of Section 35B of the Act was made by the Committee of Commissioners, the provision would appear to be complied inasmuch as the two Commissioners comprising the Committee considered the matter and on the basis of materials presented before them, took a conscious decision, by circulation, to file appeal against the impugned order-in-appeal before the Tribunal for imposition of penalty.

6. I have perused the notings of the genuineness of which is not in dispute and I am satisfied that the Committee of Commissioners duly considered the matter as required of them by sub-section (2) of Section 35B and decided, by circulation, that appeal be filed against the order in appeal on the point of imposition of penalty. Though, a formal authorization directing a Central Excise officer to file appeal in its behalf was not issued, I am of the view that the defect does not go to the root of the matter as the same can be cured post-facto by issuance an authorization at later stage, and therefore, I am inclined to think that the provisions of section 35B

(2) stood substantiated complied with and therefore the appeal cannot be dismissed summarily as not maintainable.

7. Coming to the merit of the case, it appears that there has been divergence of view on the question as to whether penalty should be imposed where duty was paid before issuance of the show cause notice. However, in the facts of the case, it is not necessary to consider the larger question. Penalty can be imposed within the framework of Section 11AC of the Act. Rule 25 of the Central Excise Rules which deals with penalty also can be applied subject to provisions of Section 11AC. As indicated above, penalty can be imposed when non payment or short payment of duty etc. was actuated by fraud, collusion, wilful mis-statement or suppression of facts or contravention of any of the provisions of the Act or rules made thereunder "with intent to evade payment of duty". Even if a case of suppression of facts or contravention of any provision were made out, it is clear that suppression or contravention per se would not justify imposition of penalty unless it was made intentionally in order to evade payment of duty. There is no such finding that non-payment of duty resulting from shortage of inputs was intentional. I am inclined to think that contravention of any provision may be unintentional too. Besides, the duty demand is Rs. 26,039/-. If we apply the ratio of the decision of the Delhi High Court in K.P. Pouches (P) Ltd. (supra), the appellant would be liable to pay 25% of said amount as penalty which would be meagre amount to justify interference by the Tribunal.

8. In the facts and circumstances, I am not inclined to interfere with the impugned orders of the authorities below. The appeal is dismissed.

[Dictated and pronounced in the open Court on 18.08.2008]

(Justice S.N. Jha)
President

[Pant]