TELEGRAM : CEGCANAL
Website : www.cestat.gov.in

REGISTERED / AD
Email : delhi@cestat.gov.in

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/460 /2007-461 /2007 – SM[BR], E/ MISC/ 872 / 2008 Date 02/01/2009

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

To :
C.C.E. KANPUR
117/7, SARVODYA NAGAR, KANPUR

C.C.E. KANPUR Appellant
Vs
M/S S.S. POLYFILMS PVT. LTD. Respondent

I am directed to transmit herewith a certified copy of **Final order No**. 1634 – 1635 /2008- **SM[BR]** dated 11.12.2008

passed by the Tribunal under Section 35-C(1)of Central Excises Act, 1944

Assistant Registrar
(SM Appeal Branch)

Copy to :

1. Respondent
1. M/S S.S. POLYFILMS PVT. LTD.
2. SH. VIJAY KANODIA, MANAGING DIRECTOR OF THE UNIT M
45, UPTRON ESTATE, PANKHI INDL. AREA, PHASE NO. 1, KANPUR

2. Adv. / Consult
NONE;-----------------

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 Publictions (P) Ltd.. 1512-B. Bhishm Pitamah marg. Opp. ICICI Bank of Defence Colony. New - 3
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
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-1
15 Office Copy
16 Guard file

Assistant Registrar
(SM Appeal Branch)

IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL, NEW DELHI
PRINCIPAL BENCH, NEW DELHI
COURT NO. IV

Excise Appeal No. 460-461 of 2007-SM, E/M/872/08

(Arising out of Order-in-Appeal No. 576-CE/APPL/KNP/2006 dated 16.11.2006 passed by the Commissioner (Appeals), Customs & Central Excise, Kanpur)

For approval and signature

HON'BLE MR. 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?**	
2.	**Whether it would 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.**	

CCE, Kanpur — Appellant

Vs.

M/s S.S. Polyfilms Pvt. Ltd. — Respondent

Appearance:
Shri S.K. Panda, Jt. CDR - For appellant
None - For respondent

CORAM:
HON'BLE MR. RAKESH KUMAR, MEMBER (TECHNICAL)

Date of Hearing: 11.12.2008

Final Order No. 1634-1635/08-SM(NB) dated 15.12.08

Per Rakesh Kumar :

This is Revenue's appeal against order-in-appeal dated 16.11.06 passed by the Commissioner of Central Excise (Appeals). The facts of the case are that the Central Excise officers paid a surprise visit to the respondent's factory on 25.6.2004 and found shortage of finished excisable goods as well as raw material in respect of which Cenvat credit had been taken. Total duty involved on the finished goods found short and cenvated raw material found short was Rs.1,05,162/-. A statement of Shri Vijay Kanodia, Managing Director of the respondent-company was recorded on the spot and he admitted that the goods found short had been sold in cash without issuing invoices and he agree to deposit the duty which was deposited on 30th June, 2004. The department, thereafter issued a show-cause notice for confirmation of duty demand of Rs.1,05,162/- in respect of finished excisable goods and cenvated raw material found short, [illegible] for imposition of penalty on the respondent-company under Section 11AC of Central Excise Act and Rule 25 of Central Excise Rules 2002 [illegible] on Shri Vijay Kanodia under Rule 26 of the Central Excise Rules. The Assistant Commissioner vide order-in-original dated 16.8.2005, while confirming the duty demand, dropped the penal proceedings against the respondents and its Director Shri Vijay Kanodia on the ground that duty had been deposited prior to issue of show-cause notice and relying upon the Tribunal's judgment in the case of **Rashtriya Ispat Nigam Ltd. Vs. CCE** reported in 2003

(161) ELT 285. On review the appeal filed by the department before Commissioner of Central Excise (Appeals), the CCE (Appeals) also vide order-in-appeal dated 16.11.06 dismissed the Revenue's appeal relying upon the Hon'ble Supreme Court's judgment in the case of **Rashtriya Ispat Nigam Ltd.** reported in 2004 (163) ELT A53 (SC) dismissing the department SLP against the Tribunal's order, in that case reported as 2003 (161) ELT 285 and also on the Tribunal's Larger Bench judgment in the case of **CCE Vs. Machino Montell (I) Ltd.** reported in 2004(168) ELT 466. It is against this order of the Commissioner of Central Excise (Appeals) that the present appeal has been filed by the Revenue for imposition of penalty on the respondent-company and its Director.

2. None appeared for the respondents. However, the respondent vide letter received by Registry on 16.9.08 have requested for decision on merits as it is not possible for them to appear before the Tribunal.

3. Heard ld. DR. He pleaded that this is a case where at the time of officer's visited certain quantity of finished excisable goods and raw material, in respect of which Cenvat credit has been taken, were found short and at that time Managing Director of the unit admitting the

shortage had clearly stated that the goods found short had been sold in cash without any invoices. From this, it is clear that this a case of deliberate clandestine removal of duty without payment of duty, therefore, just because the respondent paid the duty before issue of show-cause notice they cannot be escape the penal liability. He, therefore, pleaded that the impugned order relying upon Tribunal's Larger Bench decision in the case of **Machino Montell** (supra) case is not correct as the department's reference appeal against the Tribunal's in Machino Montell case was allowed by the Hon'ble Punjab & Haryana High Court judgement. Besides this, he also cited the judgment of Hon'ble Punjab & Haryana High Court in the case of **CCE, Vs. Omkar Steel Tubes (P) Ltd.** reported in 2008 (221) ELT 200, wherein it was held that equal penalty under Section 11AC of Central Excise Act is imposable even if the duty had been paid prior to issuance of show-cause notice, if various elements envisaged under Section 11AC of Central Excise Act are satisfied including presence of mens rea. Similar view has been taken by Hon'ble Delhi High Court in the case of **K.P. Pouches Vs. CCE.**

4. I have carefully gone through the submissions of ld. DR and also the cross-objection filed by the respondent. I have also perused the records. I find that the facts of shortage of finished excisable goods and cenvated raw material and the fact that Managing Director of the company had given a statement that the goods found short had been sold without invoices without payment of duty have not been disputed in the cross-examination filed by the respondent. There is no retraction of the statement given by Shri Vijay Kanodia, Managing Director. Therefore, this is, no doubt, a case of clandestine removal of excisable goods without payment of duty. The lower authorities while deciding not to impose penalty under Section 11AC have relied upon on the Tribunal's Larger Bench judgment in the case of **Machino Montell** and also the Tribunal's judgment case **M/s Rashtriya Ispat Nigam Ltd.** the department's SLP against which was dismissed by the Hon'ble Supreme Court. As regards he dismissed of the department's SLP in **Rashtriya Ispat Nigam Ltd.** case, ~~non~~ dismissal of a SLP does not lay down any law. Moreover, the Tribunal's Larger Bench's judgment in the case of Machino Montell has been reversed by the Hon'ble Punjab & Haryana High Court on reference appeal being filed by the Revenue vide

judgment reported in 2006 (4) STR 177 (P&H). Besides this, in recent judgments of Hon'ble Punjab & Haryana High Court in the case of **Omkar Steel Tubes (P) Ltd.** (supra) and in the case of **K.P. Pouches** (supra) where it has been held that penalty under Section 11AC of Central Excise Act would be imposable if various elements envisaged by Section 11AC of Central Excise Act are satisfied including the presence of mens rea, even if the duty had been paid prior to issue of show-cause notice. I, therefore, hold that impugned order is not sustainable and the same is set aside. I impose penalty of Rs.1,05,162/- on respondent-company and penalty of Rs.10,000/- on Shri Vijay Kanodia, Managing Director of the respondent-company. The Revenue's appeal is accordingly allowed.

(Dictated & pronounced in open Court)

(RAKESH KUMAR)
TECHNICAL MEMBER

RM
15.12.08