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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/1664 - 1665 / 2007 –SM[BR] Date 17/02/2009

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

To :
C.C.E. DELHI I

C.R. BUILDING, I.P. ESTATE, NEW DELHI 110002

C.C.E. DELHI I Appellant

Vs

M/S GRESHAYM & CO. Respondent

I am directed to transmit herewith a certified copy of **Final order No**. 188 – 189 / 2009 - **SM[BR]** dated 20.1.2009

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

Assistant Registrar
(SM Appeal Branch)

Copy to :
1. Respondent
(1-2) M/S GRESHAYM & CO.
7249, 1/1, ROOP NAGAR, DELHI.
2. Adv. / Consult SHRI. BIPIN GARG ADV.
B-1/1289-A, VASANT KUNJ NEW DELHI -110070

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
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Assistant Registrar
(SM Appeal Branch)

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.
Principal Bench, New Delhi

COURT NO. IV

Excise Appeal Nos. 1664-1665 of 2007 (SM)

[Arising out of the Order-in-Appeal No. 36 & 37-CE/DLH/2007 dated 09/04/2007 and 04/4/07 both passed by The Commissioner (Appeals), Central Excise, Delhi – I.]

For Approval and signature :
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?	:
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 Department Authorities?	:

CCE, Delhi – I — Appellant

Versus

M/s Greshaym & Co. — Respondent

Appearance

Shri M.M. Singh, Authorized Representative (DR) – for the appellant.

Shri V.S. Mishra, Advocate – for the Respondent.

CORAM : **Hon'ble Shri Rakesh Kumar, Member (Technical)**

DATE OF HEARING : 20/01/2009.

Final Order No. 188-189/09-SM(BR) Dated : 20/1/09

Per. Rakesh Kumar :-

In this case, in course of scrutiny of the ER-1 returns filed by the Respondent, it was found that by the Departmental officers that while during the month of April 2004, the duty payable was Rs. 1,70,147/- ~~from~~ the Respondent had paid the duty of only Rs. 58,147/- and as such there was short payment of duty of Rs. 1,12,000/-. Same irregularity were found for May 2004, June 2004, August 2004 and December 2004 and in respect of these months, as against the duty payable of Rs. 3,72,610/-, the duty paid was only Rs. 1,21,876/- and as such the duty amounting to Rs. 2,50,734/- had been short paid. After issue of show cause notices, the Assistant Commissioner vide orders-in-original No. 85/05 dated 30/12/05 and 86/05 dated 27/12/05 confirmed the duty demands of Rs. 1,12,000/- and Rs. 2,50,734/- irrespectively under Rule 25 (1) of Central Excise Act, 1944 alongwith interest on this duty under Rule 8 (3) of Central Excise Rule readwith Section 11AB of the Central Excise Act and besides this, imposed penalty of Rs. 1,12,000/- and Rs. 2,50,734/- irrespectively under Rule 25 (1) of the Central Excise Rules, 2002 readwith Section

11AC of the Central Excise Act. The Respondents filed appeals before the Commissioner (Appeal) against these orders and the Commissioner (Appeal) vide orders-in-appeal No. 36/CE/DLH/07 dated 30/03/07 and 37/CE/DLH/07 dated 30/03/07, while upholding the duty demands alongwith interest, set aside the penalties imposed on the Respondent observing that in such cases, penalty under Rule 25 (1) of Central Excise Rules, 2002 was not imposable and that at best penalty could be imposed under Rule 27 ibid. The Revenue has filed the appeals against these orders of Commissioner (Appeal) challenging the setting aside of the penalty on the Respondent.

2. Heard both the sides.

2.1 Shri M.M. Singh, the learned Departmental Representative pleaded that the Respondent is guilty of deliberate default in discharging their monthly duty liability, that the Respondent would not have paid duty had this short payment not been detected by the Department, that since the Respondent failed to discharge their duty liability even during period from one month from the due date, as per the provisions of second proviso to sub-rule (3A) of Rule 8, the clearances of goods during the month of April, May, June, August and December 2004 have to be treated as clearances without payment of duty and, therefore, penalty under Ruled 25 (1) (a) would automatically be attracted and that in view of this, the Commissioner (Appeal)'s order setting aside the penalty is incorrect. He also emphasized that from the conduct of the Respondent, it is clear that this is a case of deliberate clearance of goods without payment of duty, as the Respondent had simply filed the ER-1 returns mentioning the duty payable and duty actually paid and other than this, there is no intimation to the Department that they have not discharged full duty liability for the months of April, May, June, August and December 2004 and that they discharged this duty liability only when the same was pointed out sometime in May 2005. In view of this, he pleaded that the Tribunal's judgments in the cases of **Saurashtra Cement Ltd. vs. CCE, Rajkot** reported in **2008 (225) E.L.T. 395 (Tri. – Ahmd.)** and in the case of **CCE, Allahabad vs. R.K. Cigarettes (P) Ltd.** reported in **2007 (213) E.L.T. 367 (Tri. – Del.)** holding that in cases of default in discharge of monthly duty liability by the due date, penalty can be imposed only under Rule 27, are not applicable to this case.

2.2 Shri V.S. Mishra, the learned Counsel on behalf of the Respondent pleaded that in this case, there was no intention to evade the payment of duty, that non-payment of duty by the due date for the months of April, May, June, August and December

2004 was on account of financial hardship of the Respondent, as they had not received payment for the goods supplied to their customers, that as per the Tribunal's judgment in the case of Saurashtra Cement Ltd. vs. CCE, Rajkot (supra) and CCE, Allahabad vs. R.K. Cigarettes (P) Ltd. (supra) in cases of non-discharge of monthly duty liability by due date,, the penalty is imposable only under Rule 27 and not Rule 25, that the ratio of the judgment of the Tribunal in these cases is applicable to the facts of this case and that at the most, penalty can be imposed only under Rule 27 where the maximum penalty would be Rs. 5,000/-. He also cited the judgment of Tribunal in the case of **Condor Power Products P. Ltd. vs. CCE, Faridabad** reported in **2007 (79) R.L.T. 124 (CESTAT – Del.)**, wherein the Tribunal held that penalty under Rule 25 is not imposable for mere delay in payment of duty due to financial crises as there was no intention to evade the payment of duty when the transaction has been disclosed in the returns and the liability not disputed.

3. I have carefully considered the submissions from both the sides. During the period of dispute, the Respondents were discharging duty liability on monthly basis, as per requirements of Rule 8 of the Central Excise Rules, according to which duty payable on the clearances of excisable goods during ~~the~~ a month

was required to be paid by the 5th of the next month. Second proviso to sub-rule 3A of Rule 8 provides that if the assessee fails to pay the duty by the due date, till such amount outstanding and interest are not made, it shall be deemed that the goods, in question, in respect of which the duty and interest are outstanding, have been cleared without payment of duty and where such duty and interest are not paid within a period of one month from the due date, consequences and the penalties as provided in these rules shall follow. Thus, from perusal of sub-rule 3A of Rule 8, it is clear that if the duty liability is not discharged by the due date i.e. 5th of the next month, till the ~~date the~~ liability is discharged, the clearance of the goods in respect of which the duty liability has not been discharged, shall be deemed to have been made without payment of duty and where this default continues beyond the period of one month from the due date, the consequences of the same, i.e. clearance of goods without payment of duty will follow. Rule 25 (1) (a) provides for penalty for removal of any excisable goods in contravention of provisions of the Central Excise Rules. Therefore, if, the monthly duty liability has not been discharged by the due date and default continues beyond the period of one month from the due date, the goods in respect of which the duty liability alongwith interest has not been discharged, would be deemed to ~~cleared to~~ have been cleared without payment of duty i.e. in contravention of the provisions of the Central Excise Rules, and, therefore the penalty would get attracted.

4. In this case, as narrated in the show cause notice and the order-in-original, it is clear that the Appellant did not discharge their full duty liability for the months of May 2004, June 2004, August 2004 and December 2004 and ~~actually~~ simply filed the ER-1 returns mentioning the duty payable and duty paid and they have paid the duty when the Departmental Officers detected. Though it has been pleaded by the Respondent that because of financial hardship they could not discharge full duty liability for these months, there is no intention in this regard to the department and the Appellant simply filed the ER-1 returns for these months mentioning the duty payable and the duty paid and they paid the duty only when the non-payment of duty was detected by the officers sometimes in May 2005. Looking ~~in~~ to the peculiar circumstances of the case, I am of the view the Tribunal's judgment in the cases of Saurashtra Cement Ltd. vs. CCE, Rajkot (supra) and CCE, Allahabad vs. R.K. Cigarettes (P) Ltd. (supra) are not applicable. It has to be kept in mind that during the period of dispute, there was system of self-assessment under which the ER-1 returns filed by the assessee are not assessed by the Range Officers and are taken up for scrutiny selectively. Therefore, if the

ER-1 returns filed by Respondent had not been taken up for scrutiny by the Department, non-payment of duty would not have come to light. In view of these circumstances, I hold that the Commissioner (Appeal)'s order setting aside the imposition of penalty on the Respondent is not correct and the same is set aside. Looking to the circumstances of this case, I impose penalty of **Rs. 20,000/- (Rupees Twenty Thousand only) and Rs. 40,000/- (Rupees Forty Thousand only)** under Rule 25 (1) (a) on the Respondents in respect of appeal No. E/1664/07 and E/1665/07 respectively. The impugned orders-in-appeal stands modified, as above. The Revenue's appeals are allowed.

(Dictated and pronounced in open court.)

(Rakesh Kumar)
Member (Technical)

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