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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/3317 , 3232 / 2006 -SM[BR] Date 12/05/2009

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

To :
M/S SWITCH GEARS & CONTROL
C/O SIDDHARTHA CONSTRUCTIONS SHOP NO 10/11,
CANAL EXPRESS ROAD, THE MALL, KANPUR.

[2] M/S SWITHGEAR & CONTROLS
127 / 210 , W-1, SAKET NAGAR,
KANPUR

M/S SWITCH GEARS & CONTROL Appellant

Vs

C.C.E.KANPUR Respondent

I am directed to transmit herewith a certified copy of **Final order No**. 370 – 371 / 2009 -SM[BR] dated 30.4.2009

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

Assistant Registrar
(SM Appeal Branch)

Copy to :
1. Respondent
   C.C.E.KANPUR
   117/7,SARVODAYA N AGAR,KANPUR.
2. Adv. / Consult
   MR.BIPIN GARG
   B-1/1289,A-VASANT KUNJ, NEW DELHI
3 S.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)
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Assistant Registrar
(SM Appeal Branch)

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI
COURT NO.II

E/Appeal Nos.3317, 3232/2006 -SM(Br.)

(Arising out of order in appeal No.268/CE/Appl/Knp/06 dated 30.6.06 passed by the Commissioner of Central Excise (Appeals), Kanpur)

M/s Switch Gears & Control — Appellant

Vs

CCE, Kanpur — Respondent

Appeared for Appellant : Shri Bipin Garg, Advocate
Appeared for Respondent : Shri S.K. Bhaskar, DR

.....

CCE, Kanpur — Appellant

Vs

M/s Switch Gears & Control — Respondent

Appeared for Appellant : Shri S.K. Bhaskar, DR
Appeared for Respondent : Shri Bipin Garg, Advocate

Date of Hearing: 30.3.09

Coram: Hon'ble Mr.D.N. Panda, Judicial Member

Final Order No. 370 - 371 /2009 - SM (BR)

Per D.N. Panda:

Both sides have appealed before this forum against the same order. The appeal of the assessee is on the only ground that there should not have been levy of duty of Rs.2,96,710/- under Section

11A of Central Excise Act, 1944 read with section 11AC of the said Act with equal amount of penalty. Learned Counsel submits that there was an allegation of clandestine removal. He submits that the entire pleadings is on page No.11,20,21 of the appeal folder which carries page No.1,2 and 3 of the first appellate order. His principal grievance is that the material and pleadings have been ignored by the Authority below, Show cause notice is barred by limitation. No penalty is leviable under Section 11AC of Central Excise Act, 1944 and there was no evidence recorded on 1.8.99 suggesting that there was allegation of clandestine removal. If at all any private recorded is relied upon by the Revenue, the appellant cannot be debarred to lead defence by proper consideration of the pleadings. His further prayer is that the learned appellate authority denied Justice violating principles of natural justice and that can be seen from Page 19. Therefore, if natural justice is not followed, that cannot be cure at the appellate stage. Therefore, he requires the matter to be sent back to the learned adjudicating authority.

2. Revenue is in appeal Case. No.3232/06. Prayer of Revenue is to set aside the order in appeal and uphold the order in original. They are specific why they have challenged the order in appeal before this forum. Revenue is aggrieved by the waiver of penalty by the learned Commissioner (Appeals) which was imposed under Section 11-D of the Central Excise Act, 1944 read with Rule 173-Q of Central Excise Rules, 1944.

3. Heard both the sides and perused the record.

4. So far as the Revenue's appeal for restoring the appeal in original is considered, it may be stated that the law does not prescribe any penalty under Section 11D of Central Excise Act, 1944. Penalty is leviable under section 11AC for evasion of Revenue. Section 11AC refers to cases of 11A of Central Excise Act, 1944. Rule 173Q has regard to Section 11AC of Central Excise Act, 1944. Noticing such a legislative mandate and also considering the citation by the learned Advocate in the case of MCO Hospital Aids Pvt. Ltd., Vs. CCE-2002 (148) ELT 935 (Tri.-Bang.), it would be proper to hold that in absence of statutory provision, the appellant should have been considered for no penalty under Section 11D of Central Excise Act, 1944 read with Rule 173-Q of Central Excise Rules 1944. Thus Revenue appeal is dismissed.

5. The aforesaid decision leads us to consider the rest of the demand of Rs.2,96,710/- raised under Section. 11A of Central Excise Act, 1944. The grounds of appeal of the Assessee shows that the Appellant was debarred from the process of justice. To do justice to both the sides, it would be proper to send the matter back to the appropriate authority who shall examine each and every aspect of charge made in the show cause notice in so far as the applicability of Section 11AC of Central Excise Act, 1944 is concerned. The appellant should avail fair opportunity of hearing. It may be stated that the learned Commissioner (Appeals) while

appreciated the fact that clandestine removal was established, ~~it~~ he should have found that burden of proof ~~is~~ was discharged by Revenue. But he has failed to demonstrate this in his order. Therefore the matter is sent back to the learned adjudicating authority to consider the charge in Show Cause Notice afresh in relation to clandestine removal. It is expected that the Authority is at liberty to pass a reasoned and speaking order in accordance with law.

6. In the result, Revenue's appeal is dismissed. The Assessee succeeds to the aforesaid extent of remand.

(Order dictated and pronounced in the open Court).

(D.N. Panda)
Judicial Member

MPS*