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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/1897/2005 – SM[BR] Date 21/05/2009

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

To :
M/S EASTERN MEDIKIT LTD
292, UDYOG VIHAR, PHASE-II, GURGAON
(HARYANA)

M/S EASTERN MEDIKIT LTD — Appellant

Vs

C.C.E GURGAON — Respondent

I am directed to transmit herewith a certified copy of **Final order No.** 442 / 2009 –SM[BR] dated 13.5.2009 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 GURGAON

DELHI-III, VANIJYA NIKUNJ, UDYOG VIHAR, PHASE-V, GURGAON

2. Adv. / Consult SHRI RAM CHANDER CHOUDHARY ADV.
1610, SECTOR-4, URBAN ESTATE, GURGAON[H.R]

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)

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No.2, R.K.Puram, New Delhi-110066.
Principal Bench, New Delhi.

E/1897/05-SM

[Arising out of Order-in-Appeal No.107/AKG/GGN/2005 dt.2.3.05 passed by the Commissioner(Appeals), Gurgaon)

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. Wnether order is to be circulated to the : Department Authorities:

M/s. Eastern Medikit Ltd. Appellant

Versus

CCE, Gurgaon Respondent

Appearance
Shri R.C.Choudhary,Adv. for Appellant
Sh. S.K.Bhaskar, Authorised Departmental Representative, DR for Respondent

Coram: Hon'ble Mr. RAKESH KUMAR, MEMBER (TECHNICAL)
Date of Hearing 27/4/09
Pronouncement 13/5/09
Date of ~~decision. 27.4.09~~
Final Order No. 442/09-SM(BR)

Per Rakesh Kumar:

This appeal is being taken up for denovo decision in pursuance of order dt.25.9.08 of Hon'ble High Court in respect of reference Appeal No.40/2008 by Commissioner of Central Excise, Gurgaon against Final Order No.669/07-SM(BR) dt.28.3.07 passed by the Tribunal. The facts of the case in brief are as under:

The Appellants are manufacturer of Medical Disposables falling under heading 90.18 of the Tariff, Some of which are fully exempt from duty under Notification No.7/2000-CE dt.1.3.2000. The Appellant, for manufacture of medical disposables start from PVC resin [illegible]t which is first converted into PVC compound and thereafter extruded Tubing in running length, which, in turn, is used for manufacture of medical disposables like Nebulizer Kit, Endotracheal Tube etc. The Appellant take Cenvat credit of duty paid on PVC resin and other inputs. On 27.5.03, the jurisdictional Central Excise Officers visited the Appellant's factory and checked their central excise records. One of their objections was that since some of the PVC tubing was being used in the manufacture of finished goods which were fully exempt from duty, the same would not be eligible for captive consumption exemption under Notification No.67/95-CE and accordingly duty would be chargeable in respect of such clearances of PVC tubing for captive consumption for use in the manufacture of exempted goods. Another objection was that while the Appellant have taken Cenvat credit in respect of all the inputs, which have been used for manufacture of dutiable as well as exempted goods, they have not paid the amount equal to 8% value of the exempted goods as per the provisions of Rule 6(3)(b) of Cenvat Credit Rules. It is on this basis that a show cause notice dt.31.3.04 was issued for –

(a) demand of Central Excise Duty amounting to Rs.10,64,218/- on clearances of 112735 kgs. of PVC tubing manufactured and captively consumed in the manufacture of medical disposables during the period 1.3.2000 to 28.2.2002 alongwith interest on duty under Section 11AB,

(b) an amount of Rs.90,370/- payable alongwith interest in respect of clearances of exempted goods as per the provisions of Rule 6(3)(b) of Cenvat Credit Rules,2002 and since this amount had already been paid alongwith interest, for appropriation of this amount and

(c) imposition of penalty on the Appellant under Section 11AC of Central Excise Act,1944. The duty demand of Rs.10,64,218/- in respect of clearances of PVC tubing for captive consumption and also the demand of Rs.90,370/- in respect of clearances of exempted medical finished goods under Rule 6(3)(b) of Cenvat Credit Rules had been made by invoking extended period under proviso to Section 11A(1) of Central Excise Act alleging that the Appellant had suppressed the relevant information.

The Addl. Commissioner vide order-in-original dt.8.10.04 dropped the duty demand in respect of clearances of PVC tubing for captive consumption but confirmed the demand of Rs.90,370/- alongwith interest in respect of clearances of exempted finished goods under Rule 6(3)(b) of Cenvat Credit Rules,2002 and besides this, imposed penalty of equal amount i.e. Rs.90,370/- on the Appellant under Section 11AC of Central Excise Act. On appeal against this order, the Commissioner(Appeals) vide order-in-appeal dt.2.3.05 upheld the Addl. Commissioner's order. The Appellant, thereafter, filed an appeal before the Tribunal against the Commissioner(Appeals)'s order dt.2.3.05 and the Tribunal vide Final Order No.669/07-SM(BR) dt.28.3.07 reduced the penalty to Rs.25,000/- on the ground that the amount payable under Rule 6(3)(b) of Cenvat Credit Rules,2002 in respect of clearances of exempted of finished goods had been paid alongwith interest even prior to the issue of SCN and, therefore, the proviso to Section 11AC of Central Excise Act became applicable. Against this order of the Tribunal, the Department filed a reference appeal to Hon'ble Punjab & Haryana High Court and Hon'ble High Court vide order dt.25.9.08 allowed the Deptt.'s appeal and remanded this matter to the Tribunal for reconsidering the question of reduction of the penalty in the light of Hon'ble High Court's judgment in the case of CCE, Faridabad vs Illpea Paramount Pvt. Ltd., CEA No.56 of 2005 decided on 21.7.2006. The observations of Hon'ble High Court in this regard are reproduced below:

> "On checking the record of the assessee, it was found that the assessee was not maintaining separate record in respect of inputs used in manufacture of exempted goods. After following due procedure, the penalty of Rs.90,370/- was imposed. The order of penalty was upheld by the Appellant Authority but the Tribunal reduced the amount of Rs.25,000/-.

Ld. Counsel for the revenue submits that mere deposit of the amount was not enough to infer that penalty was not called for under Section 11AC of the Act in view of a Division Bench judgment of this Court in CCE, Delhi-III vs. Machino Montell (I) Ltd. 2006(202)ELT.398(P&H). The issue of penalty has to be examined as per the statutory provisions of Section 11AC which has not been done in the impugned order.

It is also pointed out that this Court in CCE, Faridabad vs. M/s. Illpea Paramount Pvt. Ltd. CEA No.56 of 2005 decided on 21.7.06, held that if a case for imposing penalty is made out, the amount of penalty prescribed under the statutory provision was the minimum.

In view of the above, we are of the view that the matter will require reconsideration by the Tribunal. The impugned order having been passed ignoring legal provisions, substantial question of law as to applicability of provisions of Section 11AC of the Act arises and has to be decided in favour of the Appellant. Accordingly, we allow this appeal, set aside the impugned order and direct the Tribunal to take a fresh decision in accordance with law.

Parties are directed to appeal before the Tribunal for further proceedings on 25.11.2008".

Accordingly, the appeal has been taken up for denovo consideration.

2. Heard both sides.

2.1 Shri R.C.Choudhary, Advocate, Ld. Counsel for the Appellant pleaded that at the time of the officers visited to the factory, it has been explained to them by showing the records that no Cenvat credit had been taken in respect of inputs used in the manufacture of exempted finished products but still on their insistence, they paid an amount of Rs.90,370/- alongwith interest; that there was no intention on the part of the Appellant to evade payment of amount as per the provisions of Rule 6(3)(b) of

Cenvat Credit Rules,2002 and in fact, according to the Appellant, no such amount was payable by them as they had not taken any Cenvat credit in respect of the inputs used in the manufacture of exempted goods and that in any case, no penalty is imposable on the Appellant under Section 11AC as ~~per~~ the provisions of Section 11AC are not applicable in respect of non-payment of the amount due as per the provisions of Rule 6(3)(b) and in this regard he places reliance on the Tribunal's judgment in the case of CCE vs Sangrur Agro Ltd. reported in 2006(202)ELT.835.

2.2 Shri S.K.Bhaskar, Ld. DR pleaded that since the Appellant had taken Cenvat credit in respect of inputs used in the manufacture of dutiable as well as exempted finished product and had not maintained separate account and separate inventory of the inputs intended , they were liable to pay an amount equal to 8% of the value of the finished products at the time of their clearances; that since the Appellant had suppressed the information in this regard from the Deptt., the Commissioner(Appeals) has rightly upheld the penalty imposed on them under Section 11AC and that held by the Hon'ble High Court in this regard while remanding this matter to the Tribunal just because the entire amount prior to the issue of SCN alongwith interest, it does not save them from the provisions of Section 11AC.

3. I have carefully considered the submissions from both the sides and perused the records. The Appellant have taken Cenvat credit in respect of common inputs which were used in manufacture of dutiable as well as

exempted finished products and it is also not in dispute that separate record and separate inventory of the inputs used in the manufacture of dutiable and exempted finished products had not maintained. Though the Appellant plead that they have not taken Cenvat credit in respect of inputs going into the manufacture of exempted finished products, I find that documents in this regard had been not produced before the Commissioner(Appeals) and as such, they have not even disputed their liability to pay an amount equal to 8% of the value of the exempted finished products at the time of their clearances. It is only imposition of penalty under Section 11AC which has been disputed. According to the Deptt., they are liable for penalty equal to this amount as per the provisions of Section 11AC. The question now arises as to whether the provisions of Section 11AC are applicable at all for non-payment of the amount due under Rule 6(3)(b) of Cenvat Credit Rules. The Tribunal in the case of CCE vs Sangrur Agro Ltd.(supra) has held that the provisions of Section 11AC are not applicable in respect of short payment or non-payment of the amount due under Rule 6(3)(b) of the Cenvat Credit Rules. As per Explanation-I to Rule 6(3), amount mentioned in Clause (a) and (b) of sub-rule 3 of Rule 6 shall be paid by the manufacture by debiting the Cenvat credit or otherwise and as per Explanation-II, if a manufacturer fails to pay the said amount, it shall be recovered alongwith interest in the same manner as provided in Rule 12 for recovery of wrongly talen Cenvat credit. Rule 12 of the Cenvat Credit Rules provides that where the Cenvat credit has been taken or utilized wrongly or erroneously refunded the provisions of the Section 11A or 11AB shall apply mutatis muntandis for such recovery. Neither Explanation-II to Rule 6(3) refers to Rule 13 for imposition of penalty if the manufacturer does not pay the amount due under this sub-rule nor Rule 13 provides for penalty in this regard. In view of these circumstances, following the Tribunal's judgment in the case of CCE vs Sangrur Agro Ltd.(supra), I hold that no penalty is imposable on the Appellant under Section 11AC and as such the impugned order upholding the penalty on the Appellant under Section 11AC is not sustainable. The impugned order, therefore, is set aside and the appeal is allowed.

(Order pronounced on 13/5/09)

(Rakesh Kumar)
Member Technical

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