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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/1210/2007-1211/2007 – SM[BR] Date 04/06/2009

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

To :
M/S LUCKY PLAST LTD.
B-485-486, IND.AREA BHIWADI, DIST. ALWAR.

M/S LUCKY PLAST LTD. Appellant
Vs
C.C.E. JAIPUR II Respondent

I am directed to transmit herewith a certified copy of **Final order No**. 531 – 532 / 2009 –SM[BR] dated 11.5.2009 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. JAIPUR II
   N.C.R.BUILDING, STATUE CIRCLE, "C" SCHEME, JAIPUR 302005.
2. Adv. / Consult
   MR.OM P.AGARWAL & CO.
   56, SECTION 7, N.P.H ROAD, JODHPUR(RAJ)
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)
16. Office Copy
17. Guard file

Assistant Registrar
(SM Appeal Branch)

M/S LUCKY PLAST LTD.
B-485-486, IND. AREA, BHIWADI, DIST. ALWAR.

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
WEST BLOCK NO. 2, R.K. PURAM, NEW DELHI

COURT – III

CENTRAL EXCISE APPEAL NO. 1210-11 OF 2007-SM

[Arising out of Order-in-Appeal No. 308/GRM/CE/JPR-II/06 dated 11.01.2007 & 309/GRM/CE/JPR-II/06 dated 11.01.2007 both passed by the Commissioner (Appeals-I), Customs & Central Excise, Jaipur]

For approval and signature:

Hon'ble Mr. P.K. Das, Member (Judicial)

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?	No
3.	Whether their Lordships wish to see the fair copy of the order?	
4.	Whether order is to be circulated to the Departmental authorities?	Yes

M/s. Lucky Plast Ltd., Appellants

Vs.

CCE, Jaipur-I Respondent

Appearance:

Shri O.P. Agarwal, C.A. for the Appellants;
Shri M.M. Singh, D.R. for the Revenue

Coram:

Hon'ble Mr. P.K. Das, Member (Judicial),

Date of hearing/decision: 11th May, 2009

FINAL ORDER NO. 531-532/09-SMC(BR) **dated** 11.5.09

Per P.K. Das:

Common issue involved in these appeals and, therefore, both are being taken up together for disposal.

2. Relevant facts of the case, in brief, are that the appellants are engaged in the manufacture of PVC Leather cloth. On 21.1.2002 Central Excise officers visited the factory premises of the appellants and conducted stock verification. The said officers detected shortage of inputs and finished goods involving central excise duty of Rs. 1,23,400/-. Shri Nair, authorized signatory of the appellant company admitted the shortage and also explained that the said quantity was cleared from their factory. They have also deposited the entire amount of duty on 21.1.2002 and 2.2.2002. Further, on 9/10th July, 2002 Central Excise officers intercepted a truck carrying finished goods of the appellant company without accompanying any central excise invoice. The appellants deposited the entire amount of duty on the goods cleared without payment of duty of Rs. 19,522/- and shortage of input credit of Rs. 47,648/- was detected during stock verification on that day. Two Show Cause notices were issued in respect of demand of duty and imposition of penalty. The original authority confirmed the demand of

duty of Rs. 1,90, 570/- and imposed penalty of equal amount. Commissioner (Appeals) upheld the adjudication order.

3. After hearing both sides and on perusal of the records, I find that the authorized signatory of the appellant company admitted the shortage of raw material as well as finished goods and explained that the said quantity were cleared without payment of duty on both occasions. It is also seen that the Central Excise officers intercepted one truck on 9/10th July, 2002 loaded with finished goods of the appellant company without accompanying any central excise invoice. Hence, it is a clear case of clandestine removal of the goods.

4. Learned Advocate submits that Hon'ble Rajasthan High Court in the case of Arora Products vs. Addl. Commr. Of Central Excise, reported in 2009 (235) ELT 818 (Raj.) held that duty paid before issuance of show cause notice, and the matter relates to period subsequent to receipt of assent of President to Finance Bill, 2001, and on combined reading of provisions of Sections 11A(2B) and (2C) of Central Excise Act, 1944 and in view of the fact that duty leviable has been deposited immediately, no penalty could be imposed under Section 11AC of the Act. He submits that in view of the decision of the Hon'ble Rajasthan High Court penalty under Section 11AC is not warranted as the appellants deposited the duty before issue of show cause notice and case relates to after 11th May, 2001. On the other hand, learned D.R. submits that Explanation (1) of First proviso to Section 11A(2B) of Central Excise Act, 1944 provides

that this section would not apply in the case of fraud, collusion or any willful mis-statement or suppression of facts or contravention of any of the provisions of this Act or the rules made thereunder with intent to evade payment of duty.

5. I find force in the submissions of the learned D.R. The main contention of the learned Counsel is that the appellants deposited the duty before issue of Show Cause Notice, therefore, penalty under Section 11AC of the Act is not applicable. It is also contended that this situation is covered by Section 11A(2B) of the Act. For the purpose of proper appreciation relevant portion of section 11A(2B) of the Act is reproduced below:-

> "(2B) Where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the person, chargeable with the duty, may pay the amount of duty [on the basis of his own ascertainment of such duty or on the basis of duty ascertained by a Central Excise Officer] before service of notice on him under sub-section (1) in respect of the duty, and inform the Central Excise Officer of such payment in writing, who, on receipt of such information shall not serve any notice under sub-section (1) in respect of the duty so paid:
>
> **Provided** that the Central Excise Officers may determine the amount of short payment of duty, if any, which in his opinion has not been paid by such person and, then, the Central Excise Officer

shall proceed to recover such amount in the manner specified in this section, and the period of "one year" referred to in sub-section (1) shall counted from the date of receipt of such information of payment.

Explanation 1. - Nothing contained in this sub-section shall apply in a case where the duty was not levied or was not paid or was short-levied or was short paid or was erroneously refunded by reason of fraud, collusion or any willful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty."

6. In the case of Arora Products (supra), Hon'ble Rajasthan High Court held that on the face of combined reading of provisions of Section 11A(2B) and (2C) of Central Excise Act, 1944 and in view of the fact that duty leviable has been deposited immediately on 8.10.2001 while show cause notice was issued on 1.4.2002 only, no penalty could be imposed under Section 11AC. It is seen that Explanation (1) of proviso to Section 11A(2B) of the Act was not the issue before the Hon'ble Rajasthan High Court and therefore, the said case law shall not apply here. The Hon'ble Punjab & Haryana High Court in the case of Commissioner of Central Excise, Delhi vs. Machino Montell (I) Ltd., 2006 (202) ELT 398 (P&H) held that once a case is covered by the situation mentioned in Section 11AC, mere deposit prior to issue of Show

Cause Notice under Section 11A of the Act will not negate the situation mentioned in the said section. In the present case, the goods were cleared without payment of duty, therefore, Section 11A(2B) would not apply as per proviso to Explanation 1 of the said sub-section. Hence, penalty under Section 11AC is warranted. However, I agree with the submission of the learned Counsel that the appellants deposited the duty before issue of show cause notice and, therefore, penalty should be 25% of the duty. In this context, learned Counsel relied upon the decision of the Hon'ble Delhi High Court in the case of CCE vs. Malbro Appliances P. Ltd., reported in 2007 (208) ELT 503 (Del.) wherein it has been held that first proviso to Section 11AC of the Act providing for penalty of 25% if duty demanded paid within 30 days of the order. In this case, the appellants deposited the duty before issuance of the show cause notice and, therefore, penalty is reduced to Rs. 47,643/- (i.e. 25% of duty amount). Both the appeals are disposed of in above terms.

(Dictated & pronounced in the Open Court.)

(P.K. DAS)
MEMBER (JUDICIAL)

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