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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/2006/2007,2010/2007 – SM[BR] Date 26/08/2009

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

To :
C.C.E. KANPUR
117/7, SARVODAYA NAGAR, KANPUR 208005.

C.C.E. KANPUR Appellant
Vs
M/S ESS JAY POLYFILM (P) LTD. Respondent

I am directed to transmit herewith a certified copy of **Final order No 1068 – 1069 / 2009 –SM[BR]**. dated 12.8.2009

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

Assistant Registrar
(SM Appeal Branch)

Copy to :
1. Respondent
   M/S ESS JAY POLYFILM (P) LTD.
   G-97, PANKI SITE NO. II, KANPUR & SHRI SHAILENDRA KHANDELWAL. DIRECTOR OF THE UNIT
2. Adv. / Consult
   NONE;--------------

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)

3. M/S ESS JAY POLYFILM (P) LTD.
G-97, PANKI SITE NO. II, KANPUR & SHRI SHAILENDRA
KHANDELWAL, DIRECTOR OF THE UNIT

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
WEST BLOCK NO.II, R.K. PURAM, NEW DELHI-110066.
BENCH-SM

Appeal No.E/2006 &2010/2007- SM

[Arising out of Order-in-Appeal No.92 & 93-CE/APPL/KNP/2007 dated 09.03.07 passed by the Commissioner (Appeals), Kanpur].

Date of Hearing:12.08.2009
Date of decision: 12.08.2009

CCE, Kanpur ...Appellant

Vs.

M/s. Ess Jay Poly Film (P) Ltd. ... Respondent

Present for the Appellant :Shri.S.K.Bhaskar, DR
Present for the Respondent:None

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

Final **ORDER NO.** 1068 - 1069/2009 SM(BR) **DATED:12.08.2009**

PER: RAKESH KUMAR

These two appeals have been filed by the Revenue against Order in Appeal No.92 & 93-CE/APPL/KNP/2007 dated 09.03.07 passed by the Commissioner, Customs & Central Excise, Kanpur by which ld. Commissioner, while upholding the duty demand confirmed by the Asst. Commissioner against the respondent for clandestine removal of finished goods without paying Excise duty, set aside the penalty on the respondent company as well as on Shri Shilendra Khandelwal, Director of the respondent, on the ground that the entire duty had been paid prior to the issue of show cause notice. The Commissioner (Appeal) is in this regard relied upon the judgement of Hon'ble Bombay High Court in the case of Gaurav

Mercantile Ltd. reported in 2005 (190) ELT 11 (Bom.), the judgement of Hon'ble High Court of Karnataka in the case of Shree Krishna Pipe Industries reported in 2004 (165) ELT 507 (Tri.) and the judgement of this Tribunal in the case of Rashtriya Ispat Nigam Ltd. reported in 2003 (161) ELT 285 (T), the Govt.'s SLP, against the which has been dismissed by Supreme Court reported in 2004 (163) E.L.T. A 53 (SC).

2. None appeared for the respondent. Their written arguments are on record.

3. Heard the ld. DR who reiterated the ground of appeal pleaded that this is a case of clandestine removal of finished goods without payment of duty, as admitted by the Director of the Company Shri Shilendra Khandelwal on 19.7.2005, that since the elements of section 11AC are present in this case, penalty should have been imposed even though the duty had been paid prior to the issue of show cause notice, that in view of Hon'ble Supreme Court judgement in the case of Rajasthan Spinning reported in 2009 (238) ELT 3 SC the penalty under section 11AC has to be imposed if the elements for imposition of penalty- fraud, suppression of fact, wilful misstatement, deliberate violation of any of the provisions of Central Excise Act, 1944 of the Rule made there-under with intent to evade payment of duty, are present and that in view of the Hon'ble Supreme Court's judgement, the judgement of Hon'ble Bombay High Court in the case of Gaurav Mercantile Ltd. (supra) or the judgement of Hon'ble Karnataka High Court in the case of Shree Krishna Pipe Industries (supra) or the judgement of Rashtriya Ispat Nigam Ltd. (Supra) are no longer a good law.

3.1 The ld. DR also pleaded that since this is a case of clandestine removal of finished goods without payment of duty and this has been admitted by the Director, the Director is also liable to face penalty under Rule 26 of the Central Excise Rules, 2002 and the Commissioner (Appeals) order setting aside the penalty on Managing Director is incorrect.

4. The respondent in their written submission pleaded that just on account of shortage of finished goods in the RG I Register, it cannot be concluded that there was clandestine removal of finished goods, that the admission of the Director does not prove clandestine removal, that there is no evidence to justify the imposition of penalty on the Director of the respondent company Shri Shilendra Khandelwal and that in any case since the duty had been paid prior to the issue of show cause notice in accordance with first proviso to section 11AC, the respondent should have been given an option by the Asstt. Commissioner to pay reduced penalty equal to 25% of the duty demand within 30 days of the issue of Order-in-Original but since this option has not been given, in view of Hon'ble Delhi High Court judgement in the case of K.P. Pouches reported in 2008 (228) ELT 31 (Del.) and the judgement of Hon'ble High Court of Punjab & Haryana in the case of CCE, Rohtak vs. J.R. Fabrics Pvt. Ltd. reported in 2009 (238) ELT 209 (P&H) they would be eligible for the lower penalty under proviso to section 11AC.

5. I have carefully considered the submissions from both the sides. The shortage of finished goods – 5485.70 Kgs of plain plastic film had been detected by the Officers at the time of surprise visits on 19.7.05 and at that time Shri Shailendra Khandelwal, Director of the respondent company could not give any explanation for the

shortage and in his statement dated 19.7.2005 he admitted that the goods had been removed without payment of duty and he also paid entire duty at that time on the shortage.

In view of the above I hold that this is a case of clandestine removal and the elements of section 11AC for imposition of penalty under 11AC are present. Hence the Commissioner (Appeals)'s order setting aside the penalty is not correct –more so in view of Hon'ble Supreme Court judgement in the case of Union of India vs. Rajasthan Spinning and Weaving Mills reported in 2009 (238) ELT 3 (S.C.). However, since the entire duty had peen paid prior to issue of show cause notice and there was no interest liability, in accordance with the first proviso to section 11AC, the Asstt. Commissioner in the Order in Original should have given an option to the respondent to avail of the payment of lower penalty under first proviso to section 11AC. Since such an option has not been given, in view of the judgement of Hon'ble Delhi High Court in the case of K.P.Pouches (supra) and the judgement in the case of Gaurav Mercantile Ltd. (supra) there is a case for reducing the penalty to 25% of the duty involved. Ordered accordingly.

6. As regards penalty on the Managing Director, in view of the fact that this is a case of clandestine removal of the finished goods and the same was with his knowledge and approval, the Asstt. Commissioner rightly imposed penalty on him and the Commissioner (Appeals order setting aside the penalty is not correct. However, since the penalty under section 11AC has been reduced to 25% of the duty amount, the penalty on Shri Shailendra Khandelwal, Director of the respondent company is also reduced to Rs.5,000/-.

7. In view of the above discussion, the order-in-appeal is set aside and order in original is restored with the above modification that the penalty under section 11AC is reduced to 25% of the duty amount and penalty on the Director of the respondent Co. is reduced to Rs.5,000/-.

8. The revenue's appeals ~~is~~ are allowed, as above.

[Dictated & Pronounced in the open Court].

(RAKESH KUMAR)
TECHNICAL MEMBER

Anita