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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

Date 16/12/2009

Appeal No. E/2291/2007 – SM[BR]

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

To :
M/S HARI KEWAL VANASPATI MILLS
BARWALA ROAD, HISSAR(HR) Appellant
Vs
M/S HARI KEWAL VANASPATI MILLS Respondent

C.C.E. ROHTAK

I am directed to transmit herewith a certified copy of **Final order No.** 1530 / 2009 –SM[BR] dated 8.12.2009 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. ROHTAK
   SCO NO,6 SECTOR 1, ROHTAK.
2. Adv. / Consult
   MR.NAVEEN MULLICK
   B-388, MERA BAGH, NEW DELHI-63.
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)

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

Excise Appeal No.2291/07-SM

[Arising out of Order-in-Appeal No.292/SSS/RTK/2007 dt.18.5.2007 passed by the Commissioner,Rohtak)

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

M/s. Hari Kewal Vanaspati Mills Appellant

Versus

CCE, Rohtak Respondent

Appearance

Sh. Naveen Mullick, Advocate for Appellant

Sh. V.K.Saxena, Authorised Departmental Representative(JCDR) For Respondent

Final Date of decision: 8.12.09
Order No. 1530/2009 SM(BR)

Per Rakesh Kumar

The facts given in this appeal are in brief as under:

1.1 The appellants are manufacturer of Vanaspati chargeable to Central Excise Duty. On 28.9.04, the appellant's factory was visited by the Central Excise Officers. In course of stock checking of the finished goods, shortage of 12.51 m.t. of Vanaspati Ghee vis-à-vis the balance recorded in R.G.I register, involving Central Excise duty of Rs.15638/- was found, which was accepted by the appellant and the entire duty was paid by the appellant at that time. The officers at that time also found a tanker No.RJ-04G-2374 in the factory premises. The tanker was found to be loaded with Crude Palm Oil. On enquiry, the appellant informed that the crude palm oil had been purchased from M/s. Newal Chand Mohan Lal Jain. An enquiry was made with Shri Rajnish Jain, Director of M/s. Newal Chand Mohan Lal Jain, who confirmed having sold 24.91 m.ts. of the crude palm oil of edible grade to the appellant and they also clarified that the crude palm of edible grade sold to the appellant was out of the oil imported at Kandla and cleared under Bill of Entry No.15115 dt.23.9.04. As per the statement of Shri Rajnish Jain, the oil found in the tanker No.RJ-04G-2374 was also same, But on chemical test of the samples drawn of the oil from the tanker, the Chemical Examiner reported the same to be of non-edible grade as its acid value was more than 10. It is on this basis that the Department took the view that the oil found in the tanker No.RJ-04G-2374 in the factory premises of the appellant was not the one which had been imported by M/s. Newal Chand Mohan Lal Jain under Bill of Entry No.15115 dt.23.9.04 and that this oil had been illicitly imported without payment of duty. It is on this basis that the crude palm oil weighing 24.9 m.t. valued at Rs.5,72,700/- found in the appellant's factory was seized alongwith the tanker. A show cause notice dt.18.3.05 was issued to the appellant for (a) demand of Central Excise Duty amounting to Rs.15,951/- along with interest on the quantity of Vanaspati found short at the time of officer's visit; (b) imposition of penalty on the appellant under Section 11AC of Central Excise Act for illicit removal of Vanaspati which was found short at the time of officers visit; (c) confiscation of the seized crude palm oil along with tanker under Section 111 & 115 of the Customs Act,1962 (d) recovery of customs duty amounting to Rs.3,72,255 + Education Cess of Rs.7,445/- chargeable on the seized crude palm oil and (e) imposition of penalty on the appellant Company under Section 112 of Customs Act,1962 and also penalty under the same section on Shri Girdhari Lal Goel, partner of the appellant company,

M/ Newal Chand Mohan Lal Jain Pvt. Ltd.

Shri Rajnish Jain, Director of M/s. Newal Chand Mohan Lal Jain

and Shri Asla Ram, Driver of the seized tanker.

2. The show cause notice was adjudicated by the Jt. Commissioner vide order-in-original dt.31.8.06 by which – (a) Central Excise Duty demand of Rs.15951/- on 12 m.t. of Vanaspati found short at the time of officers visit was confirmed alongwith interest on it at the applicable rate and besides this, penalty of equal amount was imposed on the appellant Company under Section 11AC of Central Excise Act; (b) the seized crude palm oil and the tanker was ordered to be confiscated under the provisions of Customs Act,1962 with option to be redeemed on payment of redemption fine of

Rs.1,25,500/- and Rs.15,000/- respectively; (c) Customs Duty demand of Rs.3,72,255/- + Education Cess of Rs.7445/- was confirmed against the appellant company under Section 28 of Customs Act,1962, and (d) penalty of Rs.10,000/- was imposed on the appellant company under Section 112 of the Customs Act,1962. The penal proceedings against Sh. Girdhari Lal Goel, partner of the appellant company, Shri Rajnish Jain, Director of M/s. Newal Chand Mohan Lal Jain(P) Ltd. and Shri Asla Ram, Driver of the tanker ~~was~~ were dropped.

3. On appeal to Commissioner(Appeals) by the appellant, the Commissioner(Appeals) vide impugned order-in-Appeal No.292/SSS/RTK/2007 dt.18.5.07 upheld the order-in-original passed by the Jt. Commissioner. It is against this order that the present appeal has been filed by the appellant M/s. Hari Kewal Vanaspati Mills.

4. Heard both the sides.

4.1 Shri Naveen Mullick, Advocate, Ld. Counsel representing the appellant, made the following submissions:

(1) The crude palm oil found in the tanker in the appellant's factory premises had been purchased by the appellant from M/s. Newal Chand Mohan Lal Jain(P) Ltd. and this fact has been confirmed by its Director Shri Rajnish Jain who also clarified that this oil had been imported by them at Kandla and cleared under Bill of Entry No.15115 dt.23.9.04. Shri Rajnish Jain also clarified that the palm oil sold to the appellant had been brought from Kandla in another tanker upto Delhi and at Delhi, the same had been transferred to the tanker No.RJ-04G-2743, which was found in the appellant's factory.

(2) The only basis on which the Department alleges that he oil found to be in the appellant's factory has been illicitly imported without payment of duty, is that according to the Department, on chemical test of the samples drawn from the oil, the same was found to be of inedible grade, while Shri Rajnish Jain, Director of M/s. Newal Chand Mohan Lal Jain (P) Ltd. in his statement had stated that they had imported and sold only the edible grade palm oil. The test reports of the Department are not reliable, as the appellants were informed about the test report only when they received a show cause notice and in reply to the show cause notice and subsequently also, they requested for retest of the sample but the request was not accepted. Since the request for retest was not accepted, the test have to be discarded and in this regard, reliance is placed on the Tribunal's order in the case of York Exports vs CCE, Mumbai reported in 2004(169)ELT.175. Even if the department's test report is accepted as the oil is held to be inedible oil, since the importer was M/s. Newal Chand Mohan Lal Jain(P) Ltd. and not the appellant, duty should have been demanded from them, but no action has been taken against them and proceedings have been dropped. In view of the above, Shri Mullick pleaded that there is no basis either for confiscation of the crude palm oil found in the appellant's factory or for demand of duty in respect of the same.

(3) As regards the shortage of 12 m.t. of Vanaspati, Shri Mullick did not contest the same and pleaded that since the entire duty had been paid on 1.10.2004 and interest in respect of such shortage is not demandable, the appellant should be given the benefit of reduced penalty under first proviso to Section 11AC.

4.2 Shri V.K.Saxena, Ld. Jt. CDR, defended the impugned order pleading that since the crude palm oil seized from the appellant's factory is claimed by them to have been purchased from M/s. Newal Chand Mohan Lal Jain(P) Ltd. and since the seized oil is found to be of unedible grade while M/s. Newal Chand Mohan Lal Jain admittedly had imported edible grade palm oil under Bill of Entry No.15115, the seized oil cannot be said to be the one which had been imported by M/s. Newal Chand Mohan Lal Jain under Bill of Entry No.15115; that no document regarding illicit import of the seized oil has been produced by the appellant and that in view of this, the seized palm oil has been rightly confiscated along with tanker and duty has been rightly demanded in respect of the same. He also pleaded that the shortage of 12 m.t. of Vanaspati has been admitted by the appellant and duty had been paid by them and since this is a case of clandestine removal, penalty has been rightly imposed on them under Section 11AC.

5. I have carefully considered the submissions from both the sides and perused the records. The first question to be determined is as to whether 24.9 m.t. of crude palm oil found in the appellant's factory in tanker No.RJ-04G-2374 is of a smuggled origin ~~impoed~~ imported without payment of duty and whether the same is liable for confiscation. I find that the appellant, on being asked at the time of officer's visit, had informed that this oil had been purchased by them from M/s. Newal Chand Mohan Lal Jain and on enquiry with Shri Rajnish Jain, Director of M/s. Newal Chand Mohan Lal Jain, the confirmed that this had been sold by M/s Newal Chand Mohan Lal to the appellant company and they, in turn, had imported the same at Kandla and cleared under the Bill of Entry No.15115 dt.23.9.04. The Department, however,

alleges that the oil is of smuggled origin, not covered by Bill of Entry No.15115 dt.23.9.04 on the ground that while as per the statement of Sh. Rajnish jain, crude palm oil imported under this Bill of Entry was of edible grade, the oil seized from the appellant's factory was found to be of unedible grade. In my view, just on this basis, the seized oil cannot be treated as illicitly imported without payment of duty, as immediately after the appellant came to know about the test report, they requested twice for retesting of the sample by the Chief Chemist but their request was not accepted. In view of this, following the Tribunal's judgment in the case of York Exports vs CCE, Mumbai (supra), the test report of the Chemical Examiner reporting the samples to be of unedible grade cannot be accepted. Other than the test report, there is no evidence that the seized oil had been illicitly imported without payment of duty, while the goods not being notified under Section 123 of the Customs Act,1962, the burden of proving that the same are of smuggled origin is on the Department. In view of this, neither the duty demand in respect of the seized oil nor ~~for~~ its confiscation and nor the confiscation of the tanker under the provisions of Customs Act,1962 is sustainable and hence the same are set aside. For the same reason, the penalty on the appellant under the provisions of Section 112 of the Customs Act is also set aside. As regards the duty demand of Rs.15951/- on shortage of 12 m.t. of Vanaspati, since the appellant could not give any explanation for the shortage and they themselves accepted, the same is upheld. However, since the appellant had paid the entire duty prior to the issue of show cause notice and they were not given any option by the adjudicating authority with regard to the first proviso of Section 11AC, in accordance with the Hon'ble Delhi High

Court in the case of K.P.Pouches vs CCE reported in 2008(228)ELT.31, the appellant would be eligible for the benefit of reduced penalty and accordingly,the penalty on them is reduced to 25% of the duty amount.

6. In view of the above, while the duty demand of Rs.15951/- in respect of shortage of Vanaspati is upheld penalty on the appellant on this account is reduced to 25% of the duty amount. The confiscation of the seized oil and the tanker, duty demand in respect of the oil under the provisions of Customs Act,1962 and penalty on the appellant under Section 112 of the Customs Act are set aside. The appeal stands disposed of as above,

Order dictated in the open Court.

(Rakesh Kumar)
Member Technical

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