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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 09/11/2009

Appeal No. E/2782/2007 – SM[BR]

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

To :
C.C.E. LUCKNOW
7-A, ASHOK MARG, LUCKNOW. Appellant

Vs

C.C.E. LUCKNOW Respondent

M/S VACMET PACKAGINGS (INDIA) PVT LTD

I am directed to transmit herewith a certified copy of **Final order** No. 1416 / 2009 –SM[BR] dated 1.10.2009 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 VACMET PACKAGINGS (INDIA) PVT LTD
UNIT-II, A-4/1,UPSIDC, INDUSTRIAL AREA, KOTWAN, KOSIKALAN, MATHURA(UP)
2. Adv. / Consult SHRI K.K. ANAND ADV.
A-5, BASMENT LAJPAT NAGAR-III
NEW DELHI-24.

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-1:
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)

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

West Block No.2, R.K.Puram, New Delhi

COURT-IV

Date of hearing/decision: 1.10.2009

Central Excise Appeal No.2782 of 2007-SM

Arising out of the order in appeal No.24-CE/07 dated 16.3.2007 passed by the Commissioner (Appeals), Central Excise & Service Tax, Lucknow.

For Approval and Signature:

Hon'ble Shri M. Veeraiyan, Member (Technical)

1	Whether Press Reporter may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	Yes
2	Whether it should be released under Rule 27 of CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	Yes
3	Whether their Lordships wish to see the fair copy of the Order?	Seen
4	Whether Order is to be circulated to the Departmental authorities?	Yes

C.C.E., Lucknow .... Appellant

Vs.

M/s Vacmet Packagings (India) Pvt. Ltd. .... Respondent

Appearance:

Shri Sunil Kumar, JDR for the Revenue and
Shri Hemant Bajaj, Advocate for the respondents

Coram: Hon'ble Shri M. Veeraiyan, Member (Technical)

Oral Order No. 1416/2009 SM

Per M. Veeraiyan:

This is an appeal by the Department against the order of the Commissioner (Appeals) No. 24-CE/07 dated 16.3.2007.

2. Heard both sides.

3. The relevant facts, in brief, are that the respondents are engaged in the manufacture and clearance of metallised polyester film falling under Chapter 39 of Central Excise Tariff Act, 1985. The officers visited the factory premises of the respondent on 29.11.2004 and they found the recorded quantity of stock to be about 1 lakh kgs. When they verified the stock they found shortage of 5073.400 kgs. of different varieties of excisable goods. The

value of the goods found short was arrived at Rs.6,42,816/- and the duty involved was arrived at Rs.1,04,908/- which was paid by the party on 3.12.2004. Show cause notice was issue proposing to confirm the duty which stands paid and proposing imposition of penalty. The original authority apart from confirming the demand of duty imposed penalty of Rs.1,4,908/- under Section 11AC. The Commissioner (Appeals) while upholding the demand of duty set aside the penalty.

4. The learned DR submits that the respondents have entered the goods in RG-1 after the goods fully finished; that the shortage is admitted ; that the respondents did not tender any logical explanation for the goods short found. Therefore, such shortage should be treated as a case of clandestine removal and penalty under Section 11AC is justified. In view of the above, the order of the Commissioner (Appeals) in setting aside the penalty is not proper and the said order should be set aside and penalty imposed by the original authority should be restored.

5. The learned Advocate for the respondents, after producing the copy of the show cause notice, submits that the quantity found short was a small quantity compared to the total quantity involved. The shortage appeared to be accumulated loss. The authorised signatory could not offer any explanation and agreed to pay the duty and the duty has been accordingly paid. This acceptance of shortage and payment of duty thereon should not be viewed as their having cleared the goods clandestinely. Therefore, the imposition of penalty under Section 11AC was not justified. He relies on the decision of the Hon'ble High Court of Punjab & Haryana in the case of C.C.E., Ludhiana vs. Omkar Steel Tubes (P) Ltd. reported in 2008 (221) ELT 200 (P & H) wherein it has been held that inability to explain the shortage of goods cannot be held to be clandestine removal to invoke the provision of Section 11AC.

6. I have carefully considered the submissions from both sides. At the outset, it is to be noted that the shortage of goods, on the date of visit of the officers, is not in dispute and the duty liability has been discharged and the respondent is not in appeal against the order of the Commissioner (Appeals)

confirming the demand of duty. The dispute relates to whether in the facts and circumstances of the case, the provisions of Section 11AC is attracted. The show cause notice proposed imposition of penalty merely on the ground that the authorised signatory of the company could not offer any satisfactory explanation for the shortage. No evidence of removal of the goods from the factory has been relied upon. While the obligation of an assessee to account for the goods entered in RG-1 register/statutory production register cannot be doubted, the charge of clandestine removal is a serious charge and the same requires to be based on evidence collected through investigation. In the present case, admittedly, no such evidence has been relied upon. In view of the above, the decision of the Commissioner (Appeals) in not upholding the penalty is justified. However, the reasoning adopted the Commissioner (Appeals) for setting aside the penalty namely payment of duty prior to issue of show cause notice may not hold good due to subsequent case laws. Thus, the decision of the Commissioner (Appeals) in not upholding the penalty is justified, though not the reasoning adopted by the Commissioner (Appeals).

7. In view of the above, the appeal by the Department is rejected.

(M. Veeraiyan)
Member (Technical)

scd/