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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/1298 , 1414 & 1433 / 2007 -SM[BR] Date 18/11/2009

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

To :
M/S VIBHUTI NARAIN SHUKLA ALIAS B.N.SHUKLA
PROP. OF M/S INSTANT AUTO COLOR LAB
VARANASI.
M/S VIBHUTI NARAIN SHUKLA ALIAS B.N.SHUKLA

[2] MR. ATUL KUMAR SINGH MD.
[3] M/S PELICAN TOBACCO CO LTD.
37-B, SECTOR-6, FARIDABAD HARYANA

Appellant
Vs

C.C.E. DELHI IV

Respondent

I am directed to transmit herewith a certified copy of **Final order No.** 1434 – 1436 / 2009 -SM[BR] dated 6.11.2009 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. DELHI IV
   NEW CGO COMPLEX, NH-IV, FARIDABAD, HARYANA 121001.
2. Adv. / Consult
   MR.BIPIN GARG
   B-1/1289,A-VASANT KUNJ, NEW DELHI
   [2] SHRI S.C. KAMRA ADV.
   B-2/10 [BASMENT] SAFDARJUNG ENCLAVE NEW DELHI
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)

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI
COURT NO.II

E/Appeal No.1298, 1414 & 1433/2007-SM(Br)

(Arising out of order in appeal No.1 to 6/CE/Appl/DLH.IV/07 dated 9.2.2007 passed by the Commissioner of Central Excise (Appeals), Faridabad)

1.M/s Vibhuti Narain Shukla Alias Shri B.N. Shukla — Appellant
2. Shri Atul Kumar Singh M/s Instant Auto Colour Lab
3. M/s Pelican Tobacco Co Ltd

Vs

CCE, Delhi-IV — Respondent

Appeared for Appellant : Shri Atul Gupta, Advocate(No.1)
Shri S.C. Kamra, Advocate(No.2 & 3)
Appeared for Respondent : Shri V.K. Saxena, Jt CDR

Date of Hearing: 22.10.09

Coram: **Hon'ble Mr.D.N. Panda, Judicial Member**

Final Order No. 1434 to 1436 /2009 SM (Br)

Per D.N. Panda:

These appeals centres around the dispute relating to clandestine removal of goods found in the custody of Railway authorities from 5.2.2005 and were intercepted by officers for investigation. The investigation officers noticed that 52 packets of cigarettes were lying in the custody of Railway Authority at Varanasi which were the goods delivered by M/s Pelican Tobacco Co Ltd. The investigation made resulted with issuance of show cause notice making allegation of goods found as above to be clandestinely removed escaping duty liability causing prejudice to interest of Revenue. Defence of all the three appellants were called to test the allegation. Considering the evidence of the appellants, both the authorities concurrently held that the 52 packets of cigarettes found in the custody of railways although were claimed by the appellant M/s Pelican Tobacco Co. Ltd to have been sold to one M/s Instant Agency of Luxa Road, Varanasi that remained unclaimed by the said buyer. When there was no claimants of the impugned goods found to be accompanied by Invoice Nos. 23-24 dated 4.2.2005, it was sufficient for the Adjudicating Authority to hold that the goods were clandestinely removed from the factory of the appellant. The authorities found that the appellant M/s Pelican Tobacco Company was the manufacturer while its Managing Director Shri Atul Kumar Singh was instrumental for causing removal thereof with escapement of duty liability.

2. While the factual position was as above, the appellant being aggrieved by order of adjudication went in appeal to the learned first Appellate order. The appellants lost their appeal before learned Commissioner (Appeals) who concurred with the findings of learned Adjudicating Authority. Being further aggrieved by first appellate order, the appellants came in appeal before Tribunal.

3. Learned Counsel Shri Kamra appearing on behalf of appellant No. 2 and 3 submits that there is no necessity for the appellant company or its Managing Director to prove ownership of goods seized when the same is on record of the company as reflected by

the invoices Nos. 23 and 24 dated 4.2.2005. But the authorities held against the appellant unlawfully and confiscated the goods with consequence of levy of duty, interest and penalty. His further pleading is that once the goods go out of reach of the appellant company, that no more calls for explanation as to any aspect of such goods. Shri Atul Kumar Singh and Shri V.K. Shukla were not connected with the impugned goods. Therefore, there should not be any penalty against the appellant.

4. Learned JDR appearing on behalf of Revenue fully supports the order of the learned Appellate authority and submits that the order being reasoned and speaking and evidence is on record, Not only ~~the~~ that is establishing allegations made against the appellant, there is no scope for interference with the first appellate order.

5. Heard both the sides and perused the record.

6. It is not the case of the appellant company that there was fool proof sale made to M/s Instant Agency when that agency disclaimed such goods. This comes out from evidence on record when Shri B.N. Shukla discloses that he is not connected with M/s Instant Agency. There is nothing on record to show that the sale proceeds in terms of invoice No. 23 and 24 dated 4.2.2005 issued in favour of M/s Instant Agency was discharged. Learned Counsel submits that sale proceeds are yet to be realized. While this is the status of sale, it is also strange that Revenue has not made any effort to find whether there was any Agency called M/s Instant Agency in Luxa Road, Varanasi. Materials on record and enquiry confirms that the goods claimed to have been sold under Invoice

No. 23 and 24 to M/s Instant Agency was a fake deal when no payment against such sale has come to the appellant company. So also, existence of M/s Instant Agency remains in doubt. But para 102 of appeal folder throws light that Shri V.N. Shukla was connected with the Managing Director of the appellant company and M/s Instant Agency. For no evidence from buyer's side and also no evidence on enquiry found as to existence of the 'Instant Agency' at the address as per invoice, the invoice No. 23 and 24 are only fictitious documents exist to speak against the appellants. When the invoices themselves failed to come to rescue of the appellant and the appellant fails to prove sale to be bonafide and existence of the buyer remained in question while the value and the transactions claimed to be on credit never being corroborated, the appellants fail to succeed Therefore, aforesaid two invoices dated 4.2.2005 have no legs to stand. Accordingly, appeal of M/s Pelican Tobacco Company is dismissed.

7. So far as the penalty on the Managing Director Shri Atul Kumar Singh is concerned, he does not require any leniency when the invoices do not prove to be genuine. Therefore, penalty against him is also confirmed.

8. So far as the penalty on Shri B.N. Shukla is concerned, his telephone calls with the Managing Director of the appellant company does not directly establish his liability except preponderance of probability in favour of Revenue. He has been penalized to the extent of Rs.1 lakh in adjudication. But there is no direct evidence of his active involvement with clandestine

removal. Therefore, it is proper to reduce the quantum of penalty against him to Rs. 25,000/- (Rupees Twenty thousands only).

9. In the result, appeals of M/s Pelican Tobacco Co Ltd, Shri Atul Kumar Singh are dismissed and appeal of Shri V.N. Shukla is partly allowed.

(Order dictated and pronounced in the open Court).

(D.N. Panda)
Judicial Member

MPS*