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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/816 /2009 - SM   Date **13/01/2011**

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

To :
C.C.E. NOIDA
C-56/42, SECTOR-62, NOIDA-201307

C.C.E. NOIDA   Appellant

Vs

M/S HIGH TECH PIPES LTD.   Respondent

I am directed to transmit herewith a certified copy of **Final order No.** 42 / 2011- **SM[BR]** dated 11.1.2011 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 HIGH TECH PIPES LTD.
PLOT NO.10, INDUSTRIAL AREA,
SIKANDRABAD, DISTT.
BULANDSHAHAR (U.P.)
2. Adv. / Consult SHRI PARVEEN SHARMA ADV.
KF-84,NEW KAVI NAGAR GHAZIBAD.
3. C.D.R
4. Bar association, CESTAT, New Delhi
5. Director Publications, Customs, Excise. I.P. Estate, New Delhi
6. M/s Centax Publictions Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi -
7. Company Law Institute of India Pvt Ltd.,No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
8. M/s. Deeparchie Publications, M-93, Marg. 46, Saket, New Delhi 110017
9. Taxmann Allied Service Pvt Ltd., 59/32, New Rohtak Road, New Delhi - 110005
10. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road, Ahmedabad-15
11. LAWCRUX Advisors Pvt Ltd, LAW House,1-8,Sector - 10, Faridabad 121003 (Haryana)
12. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
13. Office Copy
14. Guard file

Assistant Registrar
(SM Appeal Branch)

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI
Court No.IV

E/Appeal No. 816/09-SM

(Arising out of order in appeal No. 170/CE/Appl/Noida/2008 dated 22.12.2008 passed by the Commissioner of Central Excise (Appeals), Noida)

Date of Hearing: 25.10.2010
Date of Pronouncement: 11.1.2011

For approval and signature:

Hon'ble Mrs Archana Wadhwa, Member (Judicial)

1. Whether Press Reporters may be allowed to see CESTAT (Procedure) Rules, 1982? No
2. Whether it should 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? Seen
4. Whether Order is to be circulated to the Departmental Authorities? Yes

CCE, Noida — Appellants

Vs

M/s High Tech Pipes Limited — Respondent

Appeared for the Appellant: Shri S.K. Bhaskar, DR
Appeared for the Respondent: Shri Parveen Sharma, Advocate

Coram: **Hon'ble Mrs Archana Wadhwa ,Member (Judicial)**

Final ORDER 42/2011 SM (Br)

Per Archana Wadhwa:

Being aggrieved with that part of the impugned order of Commissioner (Appeals) vide which he has reduced the penalty upon the respondents from Rs. 2.50 lakhs to Rs.20,000/-, the Revenue has filed the present appeal.

2. I have heard Shri S.K. Bhaskar, learned DR for the appellants and Shri Praveen Sharma, learned Advocate for the respondents.

"The brief facts of the case are that the appellants had been engaged in the manufacture of pipes and tubes of GP/GC coils and also availing benefit of Cenvat credit on inputs and capital goods. The factory premises of the appellants was visited by the preventive (Anti-Evasion) officers of the Central Excise Commissionerate Noida on 8.2.2008. The officers conducted physical verification of stock of finished goods and cenvatable inputs and detected a shortage of 52.80 MT in stock of black steel tubes and 5.075 MT in the stock of G.C. sheets involving duty of Rs. 1,95,605/- and Rs. 26,504/- respectively (total Rs. 2,22,109/-). Besides the officers found that a quantity of 40 MT of HR coils (Cenvat inputs), involving Cenvat credit of Rs. 1,24,032/- was lying in the factory which was not fit for use in the manufacture of final products. On the advise of the officers, the appellants paid the amounts of duty of Rs. 1,95,605/- and Rs. 26,504/- (total Rs. 2,22,109/-) involved in the said short found stock of 52.80 MT and 5.075 MT respectively as indicated above. The appellants also paid duty amounting to Rs. 1,24,032/- involved in the above quantity of 40 MT of HR coils (inputs). The said duty amounting to Rs. 2,22,109/- and Rs. 1,24,032/- was paid vide TR-6 challan dated 11.2.2006. "

3. The Commissioner (Appeals) vide his impugned order upheld the duty of Rs. 2,22,109/- as the appellant did not challenge the same. He also upheld the duty confirmed of Rs. 1,24,032/- as input credit on the ground that the same stands paid by the appellant and they are contesting the penalty imposed upon them. The Appellate Authority observed that the Adjudicating Authority has clearly held that as regards imposition of penalty in respect of inputs on which Cenvat credit has been availed which were found to be defective and not fit for use in the final product, there is no contravention of any rule alleged in the show cause notice and as such, no penalty is warranted. Accordingly, he has observed that on the above finding of the Adjudicating authority, no penalty is imposable in respect of the modvat credit so availed by the respondents.

4. As regards the imposition of penalty in respect of the short found goods, he observed that the facts placed on record do not suggest any clandestine removal of goods and as such, there appears no malafide intention on the part of the appellant. He accordingly reduced the penalty.

5. After appreciating the submissions made by both the sides, I find that admittedly there was Short stock of the final product at the time of visit of the officers involving of duty of Rs. 2,22,109/-. The appellants have paid the said duty and have not contested the same either before the original authority or before the Commissioner (Appeals). As such the finding of the lower authorities that the short found goods were removed clandestinely, have not been put to challenge by the respondents before the Commissioner (Appeals). As such, the

observations made by the Commissioner (Appeals) that there is no evidence to suggest any clandestine removal, cannot be appreciated. If that be the case, the duty demand was also required to be set-aside by him. Having upheld the confirmation of demand of duty on the clandestine removal, the appellants were liable to penalty in terms of Section 11AC of the Central Excise Act. The Hon'ble Supreme Court in the case of Dharmendra Textiles has held that authorities working under the Central Excise Act have no discretion to reduce the quantum of penalty. In view of the law declared, I enhance the penalty to Rs. 2,22,109/- i.e. equivalent to the duty confirmed on the finding of clandestine removal.

However, it is seen that no option to make the payment of duty penalty, and interest within 30 days thereby reducing the penalty to 25% of the duty has been indicated in the orders passed by the lower authorities. Therefore, in view of the Tribunal decision in the case of *M/s. Swati Chemicals Industries & Others – 2009 (94) RLT 684 (CESTAT)*, such an option is required to be extended.

6. As regards setting aside the penalty of Rs. 1,24,032/- in respect to the input credit availed on the defective inputs, both the authorities have held that there is no contravention of any Rule alleged in the show cause notice. In such a scenario, imposition of penalty on the above ground is not warranted. Even the Revenue in their Memorandum of appeal have submitted that if any reduction in penalty was appreciated, the same should have been reduced to the

amount equivalent to the duty paid goods found short. As such, I find no reason to impose penalty on the respondents in respect of availment of credit on the defective inputs (merits on the above issue are not being discussed as the respondents themselves debited the amount. The Revenue's plea to enhance penalty on the above count is rejected.

7. In view of the above, I set-aside that part of the impugned order vide which penalty of Rs. 2,22,109/- has been set aside and allow the appeal by restoring the order of the original adjudicating authority. As discussed above, option to pay 25% of penalty within a period of 30 days is extended to the assessee, in which case the penalty shall stand reduced to 25%.

Revenue's appeal is allowed in the above terms.

(Order pronounced on 11.1.2011)

(Archana Wadhwa)
Member (Judicial)

MPS*