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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/692 – 694 / 2009 AND E / 870 / 2009 –SM[BR] –SM[BR]** Date **02/05/2011**

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

To :
M/S PRABHAT ROTOPACK (P) LTD
141 KM,AGRA DELHI BYPASS, MATHURA.

M/S PRABHAT ROTOPACK (P) LTD Appellant
Vs
C.C.E. LUCKNOW Respondent

I am directed to transmit herewith a certified copy of **Final order No. 231 – 234 / 2011-SM[BR]** dated 27.4.2011 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. LUCKNOW
7-A, ASHOK MARG, LUCKNOW.

2. Adv. / Consult
MR.RAJ KUMAR, FCA
U-18, PAWAN PLACE, SAMAD ROAD, ALIGARH

3. C.D.R
4. Bar association, CESTAT, New Delhi
5. Director Publications, Customs, Excise. I.P. Estate, New
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. Taxmann Allied Service Pvt Ltd., 59/32, New Rohtak Road, New Delhi -
9. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road, Ahmedabad-15
10. LAWCRUX Advisors Pvt Ltd, LAW House,1-8,Sector - 10, Faridabad 121003 (Haryana)
11. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
12. Office Copy
13. Guard file

2. M/S J.B.POLYMERS
141 KM,AGRA DELHI BYPASS, MATHURA.

3. RAJEEV AGARWAL,DIRECTOR
M/S PRABHAT ROTOPACK P LTD, 141 KM AGRA DELHI BYPASS, MATHRUA.

[4] M/S PRABHAT ROTOPACK PVT. LTD.
141, KM. AGRA DELHI HIGHWAY MATHURA.

Assistant Registrar
(SM Appeal Branch)

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.

COURT NO. IV

Date of Hearing : 22.3.2011

Excise Appeal No. 692-694 of 2009-SM
and
And Excise Appeal No. 870 of 2009-SM

[Arising out of the Order-in-Appeal No. 232 to 234-CE/LKO/2008 dated 29.12.2008 passed by the Commissioner (Appeals), Central Excise & Service Tax, Lucknow)

For Approval and signature :

Hon'ble Mr. Mathew John, 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?	:	Yes
2.	Whether it would 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 Department Authorities?	:	No.

M/s Prabhat Rotopack (P) Ltd.	Appellant No.1 filing Appeal No. 692
Shri Rajeev Agarwal	Appellant No.2 filing Appeal No. 694
M/s J.B. Polymers	Appellant No.3 filing Appeal No. 693

Vs.

CCE, Lucknow
Respondent

Appearance :

Appeared for Appellant : Shri Raj Kumar, CA/
Appeared for Respondent : Shri R.K. Gupta, SDR

Excise Appeal No. 870 of 2009-SM

(Arising out of Order-in-Appeal No. 232-234-CE/LKO/2008 dated 29.12.08 passed by the Commissioner (Appeals), Central Excise & Service Tax, Lucknow)

CCE, Lucknow
Appellant

Vs.

M/s Prabhat Rotopack Pvt. Ltd.
Respondent

Appearance :

Appeared for Appellant : Shri R.K. Gupta, SDR
Appeared for Respondent : Shri Raj Kumar, C.A.

Coram:

Hon'ble Mr. Mathew John, Member (Technical)

Final

Order No. 231-234/2011 SM(BR) dated................

Per Mathew John :

In this proceeding three appeals filed by three different parties who faced adverse consequence due to the same adjudication order are being considered. There is also an appeal filed by the Commissioner of Central Excise against Prahat Rotopack Pvt. Ltd. Thus altogether four appeals are being considered together.

2. M/s Prabhat Rotopack Pvt. Ltd. (Appellant No. 1) were registered with Central Excise department and they were engaged in the manufacture of printed flexible packing material

(roll form) falling under Central Excise Tariff Item 39219096, printed flexible packing material in pouch form falling under Central Excise Tariff Item No. 39239090, polyethylene film falling under Tariff Item 32151110 and printing ink falling under Tariff Item 32151110. Shri Rajeev Agarwal Appellant No. 3 is the Director of the M/s Prabhat Rotopack Pvt. Ltd, Appellant No.1.

3. On 8.11.2006, a team of Central Excise officers while conducting preventive checks at the factory premises of Appellant No. 1 verified the stock of finished goods and stock of raw material lying in the factory premises of Appellant No. 1. Shortage of 2114.93 Kg. of printed flexible packing material (roll form) valued at Rs.3,38,389/- involving total duty of Rs.55,225/- was detected. Further, the officers found that 1438.90 Kgs. of printed flexible packing material (pouch form) valued at Rs.2,60,441/-, 2956 Kgs. polyethylene film valued at Rs.2,06,920/- and 3666 Kgs. printing ink valued at Rs. 4,03,260/- were found in excess of recorded stock of these goods in their accounts. The excess goods were seized under a reasonable belief that they were kept for clandestine manufacture of finished goods and removal without payment of duty.

4. During the course of investigation, the officers came to know that another unit in the name of M/s J.B. Polymers

(Appellant No. 3), a proprietorship firm in the name of Ms. Manju Agarwal, wife of Appellant No. 2 was also housed in the same premises used by Appellant No.1. Checking was done in that premises also. During the search, the officers found two bundles of printed flexible packing material in roll form weighing 1486 kgs. ~~was found~~ in the premises of M/s J.B. Polymers which was not accounted in their books of accounts. These goods were also seized. During investigation, Appellant No. 2 stated that the said goods lying in the premises of Appellant No.3 were cleared from M/s Prabhat Rotopack (P) Ltd., Appellant No.1 and the goods belonged to them. On completion of investigation, a Show Cause Notice was issued to,-

(i) M/s Prabhat Rotopack (P) Ltd. (Appellant No. 1)

(ii) Shri Rajeev Kumar Agarwal, Director of M/s Prabhat Rotopack (P) Ltd. (Appellant No. 2) and

(iii) M/s J.B. Polymers (Appellant No. 3).

5. The Show Cause Notice was adjudicated by the Assistant Commissioner of Central Excise, Aligarh and the operative part of the order is as below :-

"In view of the above, I pass the following order:

(1) that printed flexible packing material (pouch form) weighing 1438.90 Kgs. valued at Rs.2,60,441/- polyethylene film weighing 2956 Kgs. valued at Rs.2,06,920/- and printing ink weighing 3666 Kgs. valued at Rs.4,03,260/- totally weighing 8060.90 kgs.

valued at Rs.8,70,621/- are confiscated under Rule 25(b) of the Central Excise Rules, 2002. However, I give an option to M/s Prabhat Rotopack Pvt. Ltd., Mathura to redeem the same on payment of redemption fine of Rs.2,50,000/- (Rupees Two Lacs and Fifty Thousand only). After redemption the goods should be accounted for in records maintained under Rule 10 of the Central Excise Rules, 2002. I also impose a penalty of Rs.1,50,000/- (Rupees One Lac fifty Thousand only) in terms of Section 11AC of the Central Excise Act, 1944 read with Rule 25 of the Central Excise Rules, 2002.

(2) That printed flexible packing material in roll form weighing 1486 Kgs. valued at Rs.2,37,760/- are confiscated under Rule 25(b) of the Central Excise Rules, 2002. An option to redeem the same on payment of Rs.75,000/- (Rupees Seventy Five Thousand only) is given to M/s Prabhat Rotopack Pvt. Ltd., Mathura as the said goods owned by them as per statement of Shri Rajeev Agarwal, Director.

(3) the demand of Cenvat amounting to Rs.3,26,783/- and education cess amounting to Rs.6,536/- totalling to Rs.3,33,319/- (Rupees Three Lacs Thirty Three Thousand Three Hundred and Nineteen only) is confirmed against M/s Prabhat Rotopack Pvt. Ltd., Mathura. As the said amount has already been paid by the said M/s Prabhat Rotopack Pvt. Ltd., Mathura, I appropriate the same to the credit of the Government account.

(4) that a penalty of Rs.3,33,319/- (Rupees Three Lacs Thirty Three Thousand Three Hundred and Nineteen only) is also imposed upon M/s Prabhat Rotopack Pvt. Ltd., Mathura under Section 11AC of the Central Excise Act, 1944 read with rule 25(b) of the Rules ibid.

(5) that a penalty of Rs.3,33,319/- (Rupees Three Lacs Thirty Three Thousand Three Hundred and Nineteen only) is also imposed upon Shri Rajeev Kumar Agarwal, Director M/s Prabhat Rotopack Pvt. Ltd., Mathura under Rule 26(1) of the Rules ibid.

(6) that the demand of interest under Section 11AB of the Act ibid on duty of excise amounting to Rs.2,39,292/-

paid late on 9.11.2006, is confirmed against M/s Prabhat Rotopack Pvt. Ltd., Mathura.

(7) that a penalty of Rs. 50,000/- (Rupees Fifty Thousand only) under Rule 25(a) of the Rules ibid is also imposed upon M/s J.B. Polymers, Mathura for violation of Rule 9 of the Rules ibid.

6. Aggrieved by the order of three parties filed appeal before the Commissioner of Central Excise, Lucknow. The outcome of the appeal is briefly noted below :-

(1) the confiscation of the excess unaccounted inputs found in the premises of Appellant No.1 was set aside.

(2) The penalty imposed on Appellant No.1 under Rule 25 of Cenvat Credit Rules was reduced to Rs. 50000/-

(3) The confiscation finished goods seized from the premises of Appellant No.3 was upheld

(4) Penalty imposed on Appellant No. 2 was upheld

(5) Penalty imposed on Appellant No. 3 also was upheld.

Appeal No. E 692/2009

7.1 The Appellant No. 1 is in appeal against the order of the Commissioner (Appeals) praying that penalty imposed should be reduced to 25% of the duty involved since the duty amount was deposited by him before issue of Show Cause Notice. It is also represented the redemption fine of Rs 75000/- on goods seized from the premises of J. B. Polymers is excessive and leniency may be shown to make it viable to redeem the goods. He further submitted that penalty under rule 25(b) equal to duty amount of Rs.3,33,319/- is not justified because Commissioner (Appeals) has set aside the confiscation order for inputs found to be lying in excess of the accounted stock.

7.2. The Departmental Representative submits that the department has already filed appeal against the order of the Commissioner (Appeals) to the effect that the goods found in excess are not liable to confiscation. The department pleads that the goods should have been confiscated. This issue is dealt with in the later part of this order dealing with the Appeal filed by the department.

Appeal No. E 694/2009

8.1 The argument on behalf of Shri Rajeev Kumar Agarwal, Director of M/s Prabhat Rotopack (P) Ltd. is that there is no specific allegation in the Show Cause Notice against him and there is no clear finding in the impugned order in original about his culpability. Therefore, penalty cannot be imposed. It is also argued that since duty amount of Rs. 3,33,319/- was deposited even before issue of Show Cause Notice, the penalty imposed on the main appellant itself is not sustainable and, therefore, penalty imposed on him as a Director of Appellant No. 1 is also not maintainable. There is also a submission that the penalty amount of Rs.3,33,319/- imposed on him is very harsh since the duty amount was deposited by the main appellant even before issue of SCN.

8.2 In the Central Excise Act as per Section 9AA where an offence under this Act has been committed by a company, every person who at the time of the offence was committed was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly. The section further provides that the provision of this section shall not apply if he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence. It is clear from the above section and there is a presumption that the Director was involved in the offence. Appellant no.2 has not submitted any offence to prove his innocence. Therefore, I am not able to agree with the contention of Appellant No.2. I also find that the penalty equivalent to duty imposed is actually excessive because the company itself was given an option to pay 25% of the duty evaded as penalty. There is no reason to higher penalty on the Director. Therefore, I reduce the penalty imposed on the Director, i.e, Appellant No.2 to Rs 70,000/-

Appeal NO. E-693/2009

9.1. This appeal is filed by M/s J.B. Polymers Ltd. from whose premises 1486 kgs. Printed flexible packing materials in rolls cleared from M/s Prabhat Rotopack Pvt. Ltd was seized. The main grounds in the Appeal are that since the goods belonging to Appellant No. 1 were confiscated and option to redeem the goods was given to Appellant No. 1 there is no case for imposing penalty on Appellant No. 3 who was hardly concerned with the matter. It is also argued that excise duty was paid on the goods and such duty paid goods cannot be confiscated.

9.2 The impugned penalty is seen imposed under Rule 25(a) dealing with removal of excisable goods without accounting and for non-compliance with Rule 9 of the Rules relating to registration. I find that this penalty is not in conformity with the case made out that the unit of M/s J. B. Polymers was not working for many months and the goods were manufactured by Appellant No.1. The reasons why Appellant No. 3 should have taken out registration under Rule 9 is not explained. So this penalty is not sustainable.

Appeal No. E-870 of 2009

10.1 The department filed this appeal against the impugned order for two reasons. The first reason is setting aside of the seized goods. Revenue argues that the excess raw material found should have been confiscated considering the following judgements:-

(1) Forcel India Ltd. Vs. CCE – 2004 (175) ELT 203.

(2) Kirloskar Brothers

(3) Shree Ispat Vs. CCE 2004 (163) ELT 132.

10.2 Department is also aggrieved about reduction of redemption fine of Rs.2,50,000/-, and reduction of penalty from Rs.1,50,000/- to Rs.50,000/- against the Appellant No. 1.

10.3 The Ld DR argued that the seizure of finished goods from the premises of Appellant No.3 shows that the party was in the habit of clearing goods without payment of duty. It is very obvious that the unaccounted goods were kept in the factory with the intention of clearing it without payment of duty. Since there is a statutory duty to account for manufactured goods lying in stock in the factory, the intention to evade duty become very obvious. He also argued that since the party has not paid penalty within 30 days of the order in original as required under Section 11AC concession of penalty only to the extent of 25% of duty evaded cannot be extended. The matter of redemption fine, the Departmental Representative submits that redemption fine imposed is only about 25% of the value of the seized goods which is very nominal and there is no reason to reduce the penalty. In the matter of penalty under Section 25(b), he argued that this is a separate penalty for non-maintenance of account properly and this penalty also has been properly imposed by the adjudicating authority and upheld by the Commissioner (Appeals).

10.4 Since instances of clandestine removal is admitted by the Appellant himself, there is a presumption that the unaccounted raw materials were stored with the intention of manufacturing final products and clearing it without payment of duty. So considering the case laws cited by Ld. DR, I am in agreement with the argument that confiscation of raw material found in excess done by the adjudicating authority is sustainable and the order of Commissioner (Appeal) is erroneous.

11. Keeping this in my mind my findings on various issues raised by the four Appellants in the four Appeals and counter submissions in each case, I examine each element of the order passed by the Adjudicating authority.

12. I uphold the confiscation of raw materials worth Rs. 8,70,621/- following the ratio of the decision of the Tribunal in CCE Chandigarh Vs. Auora Foam (P) Ltd- 2010 (253) ELT 696. However the redemption fine should be with reference to the duty sought to be evaded and not with reference to the value of the goods. Since this is a manufacturing process involving only little value addition, I considering that the duty rate during the relevant period was 16%, I reduce the redemption fine to Rs. 1,50,000/-. I also reduce the penalty impossible under rule 25 of Central Excise rules to Rs. 75000/- after taking note of the fact that the provisions of this rule are that the assessee "shall be liable to a penalty not exceeding the duty on the excisable goods in respect of which any contravention of the nature referred to in clause (a) or clause (b) or clause (c) or clause (d) has been committed". Thus there is no stipulation in law that the penalty to be imposed under Rule 25 should be equal to duty sought to be evaded.

13. In the case of finished goods seized from the premises of J.B. Polymers the confiscation upheld by the first Appellate authority is confirmed. However redemption fine on the goods is reduced to Rs. 38000/- having regard to the duty sought to be evaded.

14. The demand of duty amounting to Rs. 3,33,319/- on goods clandestinely removed in the past is confirmed. The appropriation of duty already paid also is confirmed.

15. The penalty of Rs. 3,33,319 imposed is for duty evaded in the past which is to be imposed under section 11AC of the Central Excise Act independent of Rule 25(b). Once penalty under section 11AC is imposed there is no scope for imposing penalty under Rule 25(b) for the same offence as decided in EVER BRIGHT TUBE CORPORATION Versus CCE, Mumbai-III - 2010 (262) E.L.T. 700 (Tri. - Mumbai). Since the demand was already paid before the issue of SCN, the adjudicating authority should have given the option to pay applicable interest and 25% of the duty evaded. Since this was not done, following the decision of Delhi High Court in K. P. Pouches (P) Ltd. Vs. UPOI-(2008 (228) ELT 31) now I give the Appellant an opportunity to pay applicable interest on duty confirmed along with 25% of the duty evaded as penalty within 30 days of receipt of the order. If such payment is made it will be in full discharge of penalty on this count. If this is not done the full penalty will be payable.

16. In the case of penalty of Rs. 3,33,316/- imposed on Shri. Rajiv Kumar Agarwal under rule 26 of the Central Excise Rules, I note that there is no legal requirement that the penalty should be equal to the duty evaded. After giving concession of paying 25% of duty evaded to the main appellant it is harsh to impose

this amount of penalty on the Director of the company. So reduce this penalty to Rs. 70,000/-

17. There has not been any contest regarding the interest payable and so the same is confirmed.

18. I find that the penalty imposed on J. B. Polymers is not based on sustainable charges and runs contrary to the totality of the case made out as already explained. So this penalty is set aside.

19. With the above modifications, the Appeals filed by the three appellants in Appeal Nos. E- 692 to 694 of 2009 are disposed of. So also Appeal No. E- 870 filed by the department is disposed of.

(Pronounced in open court on 27-04-11)

Mathew John
(Member-Technical)