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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/3039/2009 – SM[BR]** Date **07/06/2011**

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

To :
C.C.E. KANPUR
117/7, SARVODAYA NAGAR, KANPUR 208005.

C.C.E. KANPUR Appellant

Vs

M/S KOTSONS PVT. LTD. Respondent

I am directed to transmit herewith a certified copy of **Final order No. 289 / 2011 –SM[BR]** dated 25.5.2011 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 KOTSONS PVT. LTD.
C-12, UPSIDC, SITE-C,
SIKANDARA, AGRA.

2. Adv. / Consult SHRI SAURABH YADAV ADV.
A-103, DEFENCE COLONY NEW DELHI-24.

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

Assistant Registrar
(SM Appeal Branch)

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

COURT NO. I

DATE OF HEARING : 25/05/2011.
DATE OF DECISION : 25/05/2011.

Excise Appeal No. 3039 of 2009 (SM)

[Arising out of the Order-in-Appeal No. 240-241/CE/APPL/KNP/ 2009 dated 28/08/2009 passed by The Commissioner (Appeals), Central Excise, Kanpur.]

For Approval and signature :
Hon'ble Shri Justice R.M.S. Khandeparkar, President

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?	: Yes
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?	: Yes

CCE, Kanpur — Appellants

Versus

M/s Kotsons Pvt. Ltd. — Respondent

Appearance

Shri Anil Khanna, Authorized Representative (SDR) – for the Appellants.

Shri Saurabh Yadav, Advocate – for the Respondent.

CORAM : **Hon'ble Shri Justice R.M.S. Khandeparkar, President**

Final Order No. 289/2011 SM (BR) Dated : ____________

Per. Shri Justice R.M.S. Khandeparkar :-

Heard DR for the appellants and learned advocate for the respondent. This appeal arises from order dated 28th August 2009 passed by the Commissioner (Appeals), Kanpur. By the impugned order the Commissioner (Appeals) has set aside the penalty imposed by the Adjudicating Authority. The Assistant Commissioner, Agra by his order 31st March 2009 while confirming the duty demand to the tune of Rs. 3,09,486/- including education cess had imposed equal amount of penalty against the respondent company and penalty of Rs. 10,000/- against Shri Rajeev Kumar Garg, the authorised signatory of the said company. By the impugned order, the Commissioner (Appeals) while holding that the department had failed to adduce any evidence regarding clandestine removal of goods, there is no question of invocation of proviso to Section 11A (1) and hence penalty was not eligible.

2. The DR drawing my attention to the fact that on inspection of the premises by the officers of the department in the presence of independent witnesses and on physical verification of raw materials and finished goods in the factory of the respondent a shortage of raw materials as well as of finished goods was noticed and when the authorised signatory of the respondent was questioned about the same, he in his written statement recorded on the spot on 25th July 2007 admitted the said shortage and submitted that the goods were of inferior quality and hence same

were sold without payment of duty. However, he assured the payment of duty thereof and accordingly deposited an amount of Rs. 3,09,486/- under Cheque No. 035531 dated 30th July 2007 and debited vide PLA entry No. 02 dated 31st July 2007. In the background of these admitted facts, according to the Departmental Representative, the Commissioner (Appeals) could not have quashed the penalty. Attention was drawn to the decisions of the Apex Court in the matter of **Union of India vs. Dharamendra Textile Processors** reported in **2008 (231) E.L.T. 3 (S.C.)** and **Union of India vs. Rajasthan Spinning & Weaving Mills** reported in **2009 (238) E.L.T. 3 (S.C.).**

3. On the other hand, the learned advocate submits that the Commissioner (Appeals) having taken note of the fact that there was no clandestine removal of goods and the respondent having bonafide believed that there was no duty liability for goods of inferior quality and on that ground the duty was not paid at the time of clearance of the goods, however, immediately on being pointed out of the said default, the respondent had paid the entire duty without any further delay, the same disclosed bonafide on the part of the respondent, it has been held that there was no justification for imposition of penalty. A fair view of the matter having been taken by the Commissioner (Appeals), according to learned advocate, there is no justification for interference in the impugned order. Attention is drawn the decision of the Hon'ble Delhi High Court in the matter of **K.P. Pouches (P) Ltd. vs. Union of India** reported in **2008 (228)**

E.L.T. 31 (Del.). It was also submitted that in view of the payment of the entire duty much prior to the imposition of penalty, the authority could not have imposed penalty beyond 25% of the duty.

4. As rightly pointed out by DR, the order passed by the Adjudicating Authority clearly refers to unqualified admission on the part of the authorised signatory regarding the shortage of goods and failure to pay the duty in respect thereof at the time of clearance of goods, it also discloses an assurance having been given by him that the respondents would pay the necessary duty without delay and further having acted upon such assurance, and the respondents actually paid the duty amounting to Rs. 3,09,486/- within five days from such assurance. These facts are not in dispute. Being so, the fact that the respondents had cleared the goods without payment of the duty was clearly established. It was also established that the duty was paid only after the default was pointed out to the respondents by the department.

5. Section 11AC reads thus :-

> "**Penalty for short-levy or non-levy of duty in certain cases** - Where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reasons of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, the person who is liable to pay duty as determined under sub-

section (2) of Section 11A, shall also be liable to pay a penalty equal to the duty so determined :

[Provided that where such duty as determined under sub-section (2) of Section 11A, and the interest payable thereon under Section 11AB, is paid within thirty days from the date of communication of the order of the Central Excise Officer determining such duty, the amount of penalty liable to be paid by such person under this section shall be twenty-five per cent of the duty so determined :

Provided further that the benefit of reduced penalty under the first proviso shall be available if the amount of penalty so determined has also been paid within the period of thirty days referred to in that proviso :

Provided also that where the duty determined to be payable is reduced or increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the court, then, for the purposes of this section, the duty as reduced or increased, as the case may be, shall be taken into account ;

Provided also that in case where the duty determined to be payable is increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the court, then, the benefit of reduced penalty under the first proviso shall be available, if the amount of duty so increased, the interest payable thereon and twenty-five per cent of the consequential increase of penalty have also been paid within thirty days of the communication of the order by which such increase in the duty takes effect.

Explanation – For the removal of doubts, it is hereby declared that –

(1) the provisions of this section shall also apply to cases in which the order determining the duty under sub-section (2) of Section 11A relates to notices issued prior to the date on which the Finance Act, 2000 receives the assent of the President ;

(2) any amount paid to the credit of the Central Government prior to the date of communication of the order referred to in the first proviso or the fourth proviso shall be adjusted against the total amount due from such person.]"

6. The contention that since the respondent had paid the duty immediately after the default was pointed out and prior to the passing of the order in relation to the imposition of penalty, there was no justification for imposing 100% penalty and at the most 25% penalty could have been imposed cannot be accepted. In that regard attention was sought to be drawn to the first proviso to Section 11AC. The first proviso to Section 11AC does not speak about the determination of the quantity of penalty. It merely speaks about liability to pay the certain percentage of the penalty in case of fulfilment of specified obligation. It specifically provides that if the duty is paid within 30 days from the date of the communication of the order determining the duty, then the assessee can pay the penalty to the tune of 25% of the duty so determined. Obviously, the proviso does not relate to the power or the duty of the authority in relation to the determination and quantification of the penalty amount. It merely relates to the entitlement of the assessee to seek reduction in the liability to pay the penalty to the extent of 75% of the penalty in case the

duty is paid within 30 days from its determination. This is further clear from the second proviso to the said section. It specifically provides that the benefit under the first proviso can be availed only in case the penalty amount determined under the order passed by the authority is paid within 30 days referred to in the first proviso. Proper reading of the Section 11AC and bearing in mind the decision of the Apex Court in **Union of India vs. Dharamendra Textile Processors** (supra) as well as **Union of India vs. Rajasthan Spinning & Weaving Mills** (supra), it is abundantly clear that the authorities are duty bound to quantify the penalty equal to the duty amount : however, if the assessee pays entire such duty determine by the authority within 30 days from the date of communication of such order alongwith 25% of the penalty amount within such 30 days then certainly the assessee can avail the benefit of waiver of 75% of the penalty. It does not mean that the authorities have to pass the order specifying that the assessee would be liable to pay only 25% of the penalty. Bearing in mind, the law laid down by the Apex Court in **Union of India vs. Dharamendra Textile Processors** (supra) as well as **Union of India vs. Rajasthan Spinning & Weaving Mills** (supra), it is difficult to accept the contention sought to be canvassed on behalf of the respondents. The decision in **K.P. Pouches (P) Ltd. vs. Union of India** (supra) case being contrary to the law laid down in the said two decisions of the Apex Court, the same can also be of any help to the respondents.

7. It was also sought to be contended that in the case in hand the duty was paid much prior to the passing of the order by the Adjudication Authority and therefore option ought to have been given to pay only 25% of the duty to the respondent. Failure in that regard on the part of the authority renders the impugned order regarding the penalty to be bad in law. It is difficult to accept this contention. Proviso to Section 11AC nowhere speaks of any option being required to be given by the Adjudicating Authority to the assessee. Such an option is in built in the proviso itself. It is for the assessee to avail the same. Failure on the part of the assessee to avail the same cannot be of any advantage to the assessee. It is not the case of the respondent that they had tendered 25% of the penalty imposed under the order passed by the Adjudicating Authority within 30 days from the passing of the order. Certainly if such a tender was made by the respondents, they could have claimed the benefit of the first proviso to Section 11AC.

8. As rightly pointed out by DR, the Commissioner (Appeals) erred in holding that the department having failed to establish charge of clandestine removal, there was no justification of imposition of penalty. It is a case of clear admission of clearance of goods without payment of duty. The said fact being not in dispute, there was no obligation upon the department to produce any further evidence in that regard. Besides admittedly the duty in relation to the goods which were cleared without payment of duty was subsequently paid by the respondents without any

protest. In the background of these facts certainly the impugned order quashing the penalty cannot be sustained and is liable to be set aside.

9. Accordingly, the appeal succeeds, the impugned order quashing the penalty is hereby quashed and set aside of the order of the Adjudicating Authority in that regard is restored with the necessary consequences.

(Justice R.M.S. Khandeparkar)
President

PK