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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/2979/2009 – SM[BR]** Date **19/08/2011**

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

To :
M/S AMRIT BANASPATI COMPANY LTD.
CHANDIGARH ROAD, RAJPURA, DISTT. PATIALA.

M/S AMRIT BANASPATI COMPANY LTD. Appellant

Vs

C.C.E. CHANDIGARH Respondent

I am directed to transmit herewith a certified copy of **Final order No. 490/2011-SM[BR]** dated 21.7.2011 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. CHANDIGARH
C.R. BUILDING, PLOT NO. 19,
SECTOR 17-C, CHANDIGARH
160017

2. Adv. / Consult
MR.G.S.BHANGOO
H.NO. 5, SECTOR-10A, CHANDIGARH.

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. III
Excise Appeal No. 2979 of 2009 (SM)

[Arising out of the Order-in-Appeal No. 45/CE/CHD-II/09 dated 20/10/2009 passed by The Commissioner (Appeals), Central Excise, Chandigarh – II.]

For Approval and signature :
Hon'ble Shri Rakesh Kumar, 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? :

2. Whether it would be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not? :

3. Whether their Lordships wish to see the fair copy of the order? :

4. Whether order is to be circulated to the Department Authorities? :

M/s Amrit Banaspati Company Ltd. Appellant

Versus

CCE, Chandigarh – II Respondent

Appearance

Shri Vikrant Kachria, Advocate – for the appellant.

Mrs. R.K. Jagdev, Authorized Representative (SDR) – for the respondent.

CORAM : **Hon'ble Shri Rakesh Kumar, Member (Technical)**

DATE OF HEARING : 21/07/2011.

Final Order No. 490/2011 SM (BR) Dated : ____________

Per. Rakesh Kumar :-

The appellant are manufacturers of vanaspati and their sales are through depots to which the clearances are made on stock transfer basis on payment of duty. In course of scrutiny of the records of the appellant for the year 2004-2005, it was found that while as per the balance sheet of the appellant for this year, the total sales of vanaspati were 57,102 M.T., as per the ER-1 returns filed during the financial year 2004-2005 their total clearances on which duty was paid was 57,020 M.T. The department was of the view that 82 M.T. of vanaspati has been cleared without payment of duty and on this basis duty of Rs. 1,04,550/- was demanded by issue of show cause notice, alongwith interest and penalty also was sought to be imposed. The duty demand alongwith interest was confirmed by the Assistant Commissioner vide order-in-original dated 24/11/08. He also imposed penalty of equal amount on the appellant under Section 11AC. On appeal to Commissioner (Appeals), the Commissioner (Appeals) vide order-in-appeal dated 20th October 2009 upheld the order of the Assistant Commissioner. Against this order of the Commissioner (Appeals), the present appeal has been filed.

2. Heard both the sides.

2.1 Shri Vikrant Kackria, Advocate, the learned Counsel for the appellant, pleaded that the appellant sales are through depots, that every depot at the time of beginning of the financial year has some opening balance which is the stock of the last financial year, that as on 1/4/2000, the total opening balance of vanaspati, mustard oil and refined oil at the depot was 1295.398 M.T., that the total quantity of the goods sold from the depot would also include the last financial year's stock, and the same would not accept the match with the quantity of the goods cleared from the factory, that difference between the balance sheet figure for the year 2004-2005 and the total quantity of the goods cleared during the same period on the basis of the figures in the ER-1 returns is only for the reason mentioned above as the two figures are bound to be different, that in addition to this, the appellant were also engaged in trading activities from their depot and the sales of the vanaspati and other goods purchased from third parties are also included in the balance sheet figure, that in view of this simply on the basis of difference between the ER-1 figure of clearances and balance sheet figure of sale it cannot be presumed that the excess quantity has been manufactured and cleared from the factory, that Tribunal in the case of **Toshika International Ltd. vs. CCE, Chandigarh** reported in **2009 (240) E.L.T. 68 (Tri. – Del.)** has held that duty demand based only on the figures mentioned in the balance sheet submitted to Health Department in response to tenders for supply of medicines, is not the evidence of clandestine manufacture and removal when no investigation has been done by the revenue regarding procurement of inputs, manufacture and clearance, that Tribunal in the case of **CCE, Patna vs. Universal Polythelene Industries** reported in **2001 (130) E.L.T. 228 (Tri. – Kolkata)**, has held that clandestine removal and clearance is a serious charge against a manufacturer which is required to be proved by tangible evidence and that allegation of clandestine removal cannot be made only on the basis of balance sheet, that same view has been taken by the Tribunal in the case of **CCE, Hyderabad – IV vs. Vanifab Engineers Pvt. Ltd.** reported in **2006 (205) E.L.T. 893 (Tri. – Bang.)**. that the show cause notice itself mentions third party purchases, that since the goods purchased from third party have also been sold and their quantity would be included in the total quantity of the goods sold, as mentioned in the balance sheet, while alleging clandestine clearances on the basis of difference between the balance sheet figure and ER-1 returns this factor has also to be considered, and that since the entire allegation of removal of vanaspati without payment of duty is based on the figures taken from the balance sheet and ER-1 returns, therefore, the appellant cannot be accused of suppression of relevant information and, hence, the show cause notice demanding duty is time barred. In view of the above, he pleaded that the impugned order is not correct.

2.2 Mrs. R.K. Jagdev, the learned Senior Departmental Representative, defended the impugned order by reiterating the findings of the Commissioner (Appeals) and pleaded that as discussed by the Commissioner (Appeals) in para 4 of the impugned order, while for the year 2004-2005 the total opening balance as on 1/4/04 and goods received from the factory on stock transfer basis is 1295.398 M.T., closing balance as on 31/03/2005 is 1609.681 M.T. and stock transfer as per ER-1 return is 5702 M.T. and, therefore, the total sale during the year must be 56,705.717 M.T. while the balance sheet mentions the sale figure (1609.681 M.T. + 56705.717 M.T. – 58315.398 M.T.) as 57,102 implying that there is excess in sale to the tune of 396.283 M.T., that the Commissioner (Appeals) in spite of the excess sale of 396.283 M.T. has confined the duty demand only on 82 M.T. observing that he cannot transfer the show cause notice, that no explanation has been provided by the appellant regarding the difference between the balance sheet figure and the ER-1 figure, that what has been admitted by an assessee need not be provide by the department, and that in view of this, there is no infirmity in the impugned order.

3. I have carefully considered the submissions from both the sides and perused the records.

4. In this case the duty demand has been made on the basis of difference between the figures of total sales as reflected in

the balance sheet for the year 2004-2005 and the quantity of duty paid clearances as reflected in the ER-1 returns filed during 2004-2005, I agree with the appellant's contention that the figures of sales and clearances cannot compared when the sales are through depot and more so, an assessee is also engaged in trading of the goods purchase from the third parties. In this case, the third party purchases are mentioned in the show cause notice itself. The Commissioner (Appeals) while upholding the allegation of clearances of finished goods without payment of duty, has determined the quantity of the goods cleared during 2004-2005 and which were sold from depots by subtracting the closing balance as on 31/3/05 from the total of the opening balance as on 1/4/04 and stock transfer during the year 2004-2005 and on this basis, he has concluded that the total sales during the year were 58315.398 M.T. while the sales as mentioned in the balance sheet are 57,102 MT and on this basis has concluded that there are excess sales to the tune of 396.283 M.T. without payment of duty. However, in this analysis he has not considered the appellant's claim that they were also selling the goods purchase from third parties which are referred to in the show cause notice. In view of this, the impugned order is not correct. The same is set aside and the matter is remanded to Commissioner (Appeals) for denovo decision after taking into consideration, the appellant's contention that in addition to the goods manufactured by them they were also selling the goods purchased from the third parties.

(Dictated and pronounced in open court.)

(Rakesh Kumar)
Member (Technical)

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