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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/2696/2009 – SM[BR]** Date **25/08/2011**

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

To :
C.C.E ALLAHABAD
38,M.G.MARG, CIVIL LINES, ALLAHABAD

C.C.E ALLAHABAD Appellant

Vs

M/S GALLANT UDYOG LTD. Respondent

I am directed to transmit herewith a certified copy of **Final order No.503 /2011-SM[BR]** dated 11.8.2011 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 GALLANT UDYOG LTD.
VIKAS NAGAR, GORAKHPUR,
(U.P.)

2. Adv. / Consult SHRI A.K. DIXIT ADV.
M/S RESPONDENT:-----------------------

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 AND SERVICE TAX APPELLATE TRIBUNAL,
West Block No.2, R.K.Puram, New Delli,

Court No.II

Date of hearing & decision : 11. 08. 2011

Ex. Appeal No.E/2696/09-SM

(Arising out of O/A No. 94-CE/Alld/2009 dated 15.6.2009 passed by Commissioner (Appeals), Central Excise, Allahabad)

For approval and signature:

Hon'ble Mr. D. N. Panda, Member (Judicial)

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 should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not? :
3. Whether His Lordship wishes to see the fair copy of the Order? :
4. Whether Order is to be circulated to the Departmental Authorities? :

Commissioner of Central Excise, Allahabad

...APPELLANT(S)

VERSUS

M/s Gallant Udyog Ltd.

RESPONDENT (S)

APPEARANCE

Rep. by Shri Anil Khanna, DR for the Department
Rep. by Shri A. K. Dixit, Adv. for the Respondent (s)

CORAM:

Hon'ble Mr. D. N. Panda, Member (Judicial)

Final Oral Order No. 503/2011 SM (Br)

Per Mr. D. N. Panda :

Ld. DR for the Department submits that when there was certain shortage of stock found and the respondent was given adequate opportunity to explain, there was total failure on the part of the respondent to lead its defence for which at page 13 of the adjudication order, the authorities brought out as under :

> "The moot issue to be decided whether demand on short found quantity can be confirmed treating it as it has been clandestinely removed and a penalty can be imposed under Section 11AC of the Central Excise Act, 1944 and Rule 25 of the Central Excise Rules, 2002. The allegation leveled against the party is that they have cleared 90.052 MT of M.S. Bars clandestinely without paying proper duty as it was found short in their stock of M.S.Bars. It was calculated by the officers of Anti-Evasion wing of Central Excise, Allahabad on the average weight basis. The party counteracted saying that they were manufacturing 8 to 25 mm of M. S. Bars and the weight of M.S.Bars depends on the thickness of the Bars but the physical verification report apart from being prepared on average basis also does not specify the thickness of the M.S.Bars contained in the bundles counted for determining the weight. They also claimed that since the stock of M.S.Ingots and other raw materials were found I order, the alleged shortage of M.S.Bars cannot be corroborated with other evidences."

2. Ld. DR further explains that there was a categorical admission by the party who was aware of the shortage and excess and depositions were made. Such a piece of evidence is a good evidence which remained unrebutted. To support his contention, he relies on the decision of Hon'ble Madras High Court in the case of Alagappa

Cements Pvt. Ltd. Vs. CEGAT, Chennai reported in 2010 (260) ELT 511 (Mad.).

3. Ld. Counsel for the Respondent submits that there was no positive evidence came on record to show that the respondent was involved in the clandestine removal of the goods as is stated in paras 2 & 3 of the adjudication order. The authorities did not reconcile the goods with the recorded figures and by eye-estimation panchanama was drawn. He further submits that no materials were recovered by the revenue to show that there was any purchase or sale of inputs beyond record. Therefore, the appellate authority has considered the issue properly and given relief to the respondent.

4. Heard both sides and also perused the allegations made against the respondent. Eye estimation plea of the Respondent was discarded when the Respondent did not provide reconciliation statement to the investigating authority. The deposition recorded in the course of investigation, clearly shows that the respondent was conscious of pilferage i.e. shortage. Such a conscious conception resulted with the admission for payment of duty and the plea of eye estimation failed. The respondent failed to call for cross examination of Panchas when the quantity detected during investigation was challenged on the ground of improper stock taking by investigation. The manner in which adjudication was done, does not throw light that the authorities failed to demonstrate the nature of allegation. The evidence tested by him resulted in the inference that the Respondent has questionable modus operandi. The adjudicating authority recorded the defense

plea of the assessee very well and tested the same. He even examined entire materials placed by him.

5. Reading of the appellate order shows that the appellate authority failed to appreciate that Section 14 evidence was recorded at preliminary stage and on the spot which has much credentiality. That remained unrebutted without cogent evidence came to record. The Hon'ble High Court of Madras in the case of Algappa Cements Pvt. Ltd. (cited supra) clearly held that shortage and excess of stock found during investigation led to conclude that there was clandestine manufacture of goods. It may be stated that no doubt in the case of serious allegation made, burden of proof lies on Revenue. The facts and circumstances of the case suggests that the respondent had ample opportunity from 18.6.08 to explain its case before investigation. Neither at the investigation stage nor thereafter, the Respondent came forward to lead evidence to show that there was neither excess nor shortage of the goods. Possession always follows title. By admission there was no disclaimer of goods. All these grounds are sufficient to confirm adjudication in so far as duty and interest is concerned holding that Revenue discharged its burden of proof.

6. In so far as the penalty imposed under Section 11AC of the Central Excise Act, 1944 is concerned, the Respondent need to be considered in the light of first and second proviso to that Section. These two provisos nowhere say that when elements of loss of Revenue envisaged by Section 11A of Central Exise Act, 1944 exist, penalty shall be automatically levied and no reduction of penalty is allowable.

Tribunal has taken a view in the case of Bajaj Travels reported in 2011 (21) STR 497 to grant benefit reducing penalty. Against such decision Revenue went in appeal to the Hon'ble High Court. But Revenue's appeal was dismissed by the Hon'ble Court.

7. In absence of debarring provisions in Section 11 AC of the Central Excise Act, 1944 as to grant of reduced penalty, the present respondent cannot be denied of the benefit of the said relief restricting penalty to 25% of duty demanded.

8. For the reasons aforesaid, appeal of the Revenue is allowed confirming duty and interest but reducing penalty to 25% of the duty demanded, setting aside the first appellate order. The payment of such penalty should be made within 30 days of intimation to the Assessee by Adjudicating Authority.

(Dictated and pronounced in the open Court)

(D. N. Panda)
Member (Judicial)

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