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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

Date 12/09/2011

Appeal No. **E/2877/2009 – SM[BR]**

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

To :
M/S SWASTIK POLYMERS.
H-33, UDYOG NAGAR,NEW DELHI-110041.

M/S SWASTIK POLYMERS, Appellant
Vs
C.C.E. DELHI I Respondent

I am directed to transmit herewith a certified copy of **Final order No. 591 / 2011-SM[BR]** dated 23.8.2011 passed by the Tribunal under **Section 35-C(1)of Central Excises Act, 1944**

Assistant Registrar
(SM Appeal Branch)

Copy to :

1. Respondent
C.C.E. DELHI I
C.R. BUILDING, I.P. ESTATE, NEW
DELHI 110002

2. Adv. / Consult
MR.NAVEEN MULLICK,ADV
B-388, MEERA BAGH, N.DELHI

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. 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.II, R.K. PURAM, NEW DELHI-110066.
BENCH-SM

Excise Appeal No.E/2877/09-SM

[Arising out of Order-in-Appeal No.109/CE/DLH/2009 dated 28.7.2009 passed by the Commissioner of Central Excise (Appeals), New Delhi].

M/s.Swastik Polymers ...Appellant

Vs.

CCE, Delhi-I ... Respondent

Present for the Appellant : Shri Naveen Mullick, Advocate
Present for the Respondent:Shri.S.K.Bhaskar, D.R.

Coram: HON'BLE MR. D.N. PANDA, JUDICIAL MEMBER

Date of Hearing/Decision:23.08.2011

Final **ORDER NO.** 591/2011 SM (Br) **DATED:**________

PER: D.N.PANDA

Shri Mallik submits that within two days of investigation the excise duty element of Rs.1,14,527/- was debited to cenvat credit account and Revenue has been protected. Proper inventory not being taken, discrepancy was alleged as is stated in the table at para 2 of the adjudication order. If proper reconciliation of stock is made there may not arise any difference. So also he submits that not only cenvat credit was disallowed penalty of equal amount of Rs.1,14,527/- was imposed. His prayer is, therefore to set aside the adjudication which has been done arbitrarily.

2. Ld. DR on the other hand supports the order passed by appellate authority below.

3. Heard both sides and perused the record.

4. Reading of para 2 & 3 of the adjudication order throws light that the appellant was given opportunity to explain on the shortage of quantity detected. Evidence recorded under section 14 of the Central Excise Act, 1944 was evaluated and appreciated by the adjudicating authority in para 5 of the order to come to the conclusion against appellant. He tried to reconcile the shortage in para 6 of his order. The finding of the adjudication remains intact by the appellate decision when nothing could be rebutted by the Appellant. Entire plea of the appellant about loss of goods during course of manufacture was considered by Appellate Authority. Even the plea that the goods were lying here and there was considered and rejected. There was no reconciliation of stock done by Appellant before the appellate authority. The action of the authorities below is justified and reversal of cenvat credit to protect interest of

Revenue to the extent of Rs.1,14,527/- was held to be correct. Therefore, appellant's appeal fails on the levy of excise duty.

5. So far as penalty is concerned, the appellant debited duty element to the Cenvat Account within two days is not disputed by Revenue. This provides scope to consider penal aspect leniently, when the appellate authority has also not brought out contumacious conduct of the appellant. Therefore, to bring an end to the litigation reduction of penalty to the extent of 25% of the duty demanded would be proper keeping in view the spirit of first proviso and second proviso to section 11AC of Central Excise Act, 1944. Authority shall issue notice for payment of reduced penalty and if the appellant complies to that notice within statutory period of 30 days of receipt of notice, such reduced penalty benefit shall be extended, otherwise the appellant looses such relief.

5. The aforesaid decision of reduction in penalty has been taken being guided by the decision of the judgement of Hon'ble High Court of Delhi in the case of K.P. Pouches (P) Ltd. vs. Union of India – 2008 (228) ELT 31 Del. For convenience, para 27 of the judgement is reproduced below:-

> *27. To obviate any similar situation from arising in future, we are of the opinion that in its adjudication order the adjudicating authority under the Act should explicitly state the options available to the*

Assessee under Section 11AC of the Act. Once the choices are made known to the Assessee and it still does not take advantage of the first proviso to Section 11AC of the Act, it will be entirely at its own peril. Therefore, it would be beneficial, both from the point of view of the Revenue as well as the Assessee, if the options available to the Assessee are mentioned in the adjudication order itself."

6. The view of imposing penalty is also fortified from the decision of the Hon'ble High Court of Gujarat in the case of Bhagyoday Silk Industries – 2010 (262) ELT 248 (Guj.) It would be proper to reproduce para 11 of such judgement for convenience of reading:

"***11.****Before parting, we observe that the order passed by the Tribunal cannot be said to be a non-speaking and non-reasoned order. The authorities cited by Mr. Oza in support of his submission that a non-speaking order is passed by the Tribunal and hence it deserves to be dismissed, were duly considered by us and we are of the view that they are not applicable to the facts of the present case. The Tribunal while dismissing the appeal, referred to and relied on the decision of Delhi High Court in the case of CCE v. Malbro Appliances P. Ltd., reported in 2007 (79) RLT 109 (Del.) - 2007 (208) E.L.T. 503 (Del.) - 2007 (5) S.T.R. 256 (Del.). The facts are on record. The orders are before the Tribunal. There is nothing in the order of the Tribunal that any objection is raised by the departmental representative that the said decision of the Delhi High Court, is not applicable to the facts of case. The Tribunal is taking consistent view in the matters of penalty levied under Section*

11AC and when the duty amount is paid before issuance of show cause notice, the penalty is reduced to 25% of the duty amount. If the duty amount with interest is not paid in time and even reduced penalty of 25% of the duty amount is not paid in time and option is not given to the respondent-assessee, we have taken the view that such option should be given to the assessee and period of 30 days would commence from the date of giving such option. Since the respondent-assessee was challenging the levy of penalty under Section 11AC of the Act up to Tribunal and for the first time the Tribunal had reduced the penalty under Section 11AC of the Act to the extent of 25% of the duty amount on the ground that the duty amount was paid by the respondent-assessee much before the issuance of show cause notice, we direct the adjudicating authority to call upon the respondent-assessee to pay the penalty as reduced by the Tribunal and also the interest amount, if any, under Section 11AB of the Act, within 30 days from the date of receipt of communication, failing which the respondent-assessee would be liable/to pay penalty under Section 11AC to the extent of 100% of the duty amount. In this view of the matter, no interference is called for in the order of the Tribunal."

7. In the result, the appeal is partly allowed confirming duty and reducing penalty to the extent of 25% of the duty demanded.

[Dictated & Pronounced in the open Court].

(D.N.PANDA)
JUDICIAL MEMBER

Anita