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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/237 /2009 – SM[BR] **Date 22/12/2011**

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

To :
C.C.E. LUCKNOW
7-A, ASHOK MARG, LUCKNOW.

C.C.E. LUCKNOW Appellant

Vs

M/S ALVI PACKAGING INDUSTRIES LTD. Respondent

I am directed to transmit herewith a certified copy of **Final order No. 908 /2011-SM[BR]** dated 15.12.2011 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 ALVI PACKAGING INDUSTRIES LTD.
D-12, SECTOR-4, INDUSTRIAL AREA,
JAGDISHPUR,DISTRICT-SULTANPUR.

2. Adv. / Consult
NONE:-----------------

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 (Harvana)
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)

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI
Court No.III

E/Appeal No.237/2009

(Arising out of order in appeal No. 152/CE/08 dated 31.10.08 passed by the Commissioner of Customs & Central Excise(Appeals), Lucknow)

Date of Hearing: 21.6.2011

For Approval and signature: Date of Pronouncement: 15-12-11

Hon'ble Mr.Mathew John, Technical Member

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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?

CCE, Lucknow Appellants

Vs

M/s Alvi Packaging Industries Ltd Respondent

Appeared for the Appellant: Shri K.P. Singh, DR
Appeared for the Respondent: None

Coram: **Hon'ble Shri Mathew John, Member (Technical)**

Final ORDER 908/2011 SM (BR)

Per Mathew John:

When the case was called, none appeared for Respondent. But there was a letter from the Respondent to decide the case on merits.

2. The respondent is a manufacturer of Veneer Gum Tape, Core Veneer Tape, Dry Veneer Tape and Perforated Tape all falling under sub-heading 4811.20 of the Schedule to the Central Excise Tariff. The Central Excise officers conducted a surprise verification of physical stock of the goods and the books of accounts of the respondent on 10-05-03. During verification shortages of finished goods, namely, 45 bundles of Gum tape Paper and 7 bundles of Gum Paper tape involving duty of Rs. 1773 and shortage of raw material involving duty of Rs. 58 were detected. Shri. Grafan Alvi Proprietor of the Appellant firm could not explain the reasons for such shortages and paid the duties involved on the said goods.

3. On further scrutiny of the documents the officers detected 8 sets of duplicate invoices having same serial number and date but displaying different buyers quantity and values for invoices with the same number. On enquiry it was seen that the invoices which were entered in their registers showed names of consignees who were not in existence or where closed for long time. The total duty involved in 8 such invoices was Rs. 5781.00.

4. Further the officers found 8 cancelled invoices in their records. On enquiry with some of the consignees it was found that the consignee had in fact received the goods covered by such cancelled invoices. Eight such cancelled invoices involving duty of Rs. 8842 were found.

5. Further the officers found that some samples of goods involving duty amount of Rs. 28 were sent to M/s Green Valley Plywood without payment of duty.

6. A Show cause Notice was issued demanding duty amounting to Rs.16,482/- along with interest on accounted of the above stated clearances. Further penalty under Rule 25 of Central Excise rules read with section 11AC was proposed.

7. The Show Cause Notice was adjudicated by order dated 27-09-2007 confirming the duty demanded to the extent of Rs. 16219/- (Rs. 1831/- as per para 1 above, Rs. 5546/- out of Rs. 5781/- as per para 2 above and Rs. 8842/- as per para 3 above). Further a penalty of Rs. 16219/- under rule 25 of CER 2004 read with section 11AC of the Act was imposed.

8. Aggrieved by the order the Appellant filed appeal with the Commissioner (Appeal). The Commissioner (Appeal) after detailed consideration of the submissions made by the Respondent confirmed the duty element in para 1 above and duty on one of the invoice namely 4524 dated 21-04-03 with duty amount of Rs. 418/- of the type mentioned in para 2 and duty in respect of two invoices namely 4528 dt 25-04-03 and 4565 dated 03-05-03 totalling to Rs. 1024.32.

9. Thus, the total duty confirmed by the Commissioner (Appeals) was Rs.3273/-. He had also confirmed penalty of Rs. 3,273/-.

10. Aggrieved by the order of the Commissioner (Appeal) Revenue has filed this appeal.

11. The Ld DR who appeared on behalf of the Appellant contested that in this case the assesse was in the habit of clearing goods against duplicate invoices as is evident from the detection of goods found short on verification of stock and from the fact that duplicate invoices were actually detected in their records. Further he says that the assessee should have informed the department when invoices were cancelled. He says that in respect of invoices dealt with in para 3 above, the assesse had not intimated the department about cancellation of the invoices and so the malafide intention of the assesse is very clear. He prays for restoration of the Order-in-Original.

12. In the matter of duplicate invoice, the Commissioner (Appeals) gave relief for reasons recorded in para 6 (B) of the order which is reproduced below:

"Regarding parallel set of invoices on scrutiny of records, I observe that except invoice No. 4524 dated 21.4.2003, none of the invoices contain signature of authorised signatory or proper seal of the appellant's unit. The Revenue had established the proof of removal of goods only in respect of invoice No. 4484 (duty involved Rs. 41760). Regarding rest of invoices, I observe that nothing concrete could be put forward by the revenue".

13. Revenue is contesting this finding for the following reasons:-

"Necessary enquiries were got conducted from the respective consignees of invoices in respect of which two sets of invoices were found, through jurisdictional Central excise authorities. It was revealed that in respect of parallel invoice as not entered in records viz RG.I and ledger, it was revealed that either goods were not received by the consignee or the consignee factory did not exist or was closed since long. In fact some of the invoices which were entered in records and in respect of which duty has been paid, also contained names of the consignees which are non-existent or closed since long e.g. M/s Bhawani Tea Chest (P) Ltsd Kothi Hat Road, Forbisgang (Bihar), M/s Krishna Industries (P) Ltd Ganeshpur Barni etc."

"Regarding non-existent units and mode of payment Shri Alvi in his statement dated 8.2.07 clarified that agents used to bring orders from buyers and also made payments to them in respect of the price of the goods and that he never enquired whether the consignees existed or not. Therefore, the fact that the units/consignees mentioned in the parallel invoices did not exist or they did not receive the goods mentioned in the parallel invoices is not material and on this basis, it cannot be held that goods were not cleared on such invoices".

14. The reasons given by the Respondent for preparing two invoices with same Sl No and date is not acceptable. Further the consignees in most cases are fake. In one case, it is clearly

established that goods were cleared against two invoices of the same number and date. So it is reasonable to conclude that all cases listed in Annexure 1B to SCN were cases of clandestine removal.

15. In respect of cancelled invoices in Annexure II of Show Cause Notice, Commissioner (Appeals) recorded his finding as under:-

"I observe that all the 4 copies of invoices including the quadruplicate copy in respect of Sl No. 1 to 6 of Annexure II to the show cause notice are available in the invoice book but in respect of invoices, issued to M/s A.R. Polymers, Kanpur, mentioned at Sl no. 7 and 8 of Annexure II to the show cause notice, only triplicate and quadruplicate copies are found by the officers in the invoice book The revenue has also established that goods have been removed on these invoices (mentioned at Sl No. 7 and 8 of Annexure II to the show cause notice) without payment of duty but revenue could not establish the clandestine removal regarding rest of invoices. I observe that Revenue could not put forward evidences to substantiate the allegation of clandestine removal except aforesaid three invoices, the benefit of doubt has to be extended to the appellant in the absence of any corroborative evidence and on the face of doubtful nature of invoices. It is well established that the charge of clandestine removal cannot be confirmed on the basis of surmises and conjectures and require positive and tangible evidence."

16. Revenue is contesting this finding with the following argument:

"It further appeared that the party also cancelled certain invoices, as detailed in the Annexure II to the SCN but no intimation of its cancellation had been given to the department These cancelled invoices were available in the invoice books and the goods cleared vide the said cancelled invoices have not been recorded in the RG-I register. But on enquiry in respect of cancelled invoice No.4528 dated 25.4.03 and 4565 dated 3.5.03, the consignee M/s

A.R. Polymers Pvt Ltd Kanpur vide their letter dated 20.12.06 informed that they had indeed received the goods under the said invoices which were duly entered in their records. Thus it appears that the party cleared the goods mentioned in the cancelled invoice and collected the price of the goods but cancelled the invoice subsequently with intent to evade the payment of duty leviable thereon.

17. It is noticed in respect of items 1 to 6 in respect of which Commissioner (Appeals) gave benefit of doubt, the remarks in Annexure II of SCN that one set of quadruplicates were available in the invoice book. Further one more extra set of quadruplicates were available in the book of quadruplicate copies recovered from party's head office at Lucknow. In two cases, it was established that though invoices were cancelled the goods were actually delivered to the consignees. These evidences implies that the cancelled invoices were only instruments for clandestine removal. Clandestine removal is proved on the basis of pre-ponderence of probability. I do not agree with the finding of the Commissioner (Appeals) that demand need to be confirmed only in two cases. The total duty demanded as per Annexure II to SCN is demandable.

18. On the whole, this was not a fit case for the Commissioner (Appeals) to have interfered with the order in original. In view of my findings as above, I set aside the impugned order and restore the order of adjudicating authority. However, the respondent is given option to pay 25% of duty confirmed as penalty within 30 days of receipt of this order and if payment is so made, it shall be in full discharge of the penalty. Otherwise full penalty is recoverable.

(Pronounced on 15/12/2011)

MPS*

(Mathew John)
Member(Technical)