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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/1103/2008 – SM[BR] Date 16/03/2010

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 BEE KAY ENTERPRISES Respondent

I am directed to transmit herewith a certified copy of **Final order** No. 321 / 2010 –SM[BR] dated 9.3.2010 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 BEE KAY ENTERPRISES

D-80,UDHYOG KUNJ,PANKI SITE-V,KANPUR
2. Adv. / Consult SHRI A.K. DIXIT ADV.
113/145, SWAROOP NAGAR KANPUR[U.P.]

3 S.D.R
~~4 J.C.D.R.~~
5 Bar association, CESTAT, New Delhi
6 Director Publications, Customs, Excise, I.P. Estate, New Delhi
7 M/s Centax Publictions Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi - 3
8 Commercial Laws of India Pvt Ltd. Post Bag No. 1033, No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
9 Raghuraman's 44-B, Regal Flat,Shipra Suncity, Indirapuram - 201010,Ghaziabad, DT, U.P.
10 M/s Manupatra Information Solutions Pvt Ltd. Excise & Customs Cases B-37, Sector - 1, Noida - 201301, Gautam Budh Nagar, (UP)
11 M/s. Deeparchie Publications, M-93, Marg, 46, Saket, New Delhi 110017
12 Taxindiaonline.com Pvt.Ltd, B-XI/8183,Vasant Kunj, New Delhi - 110070
13 Taxmann Allied Service Pvt Ltd., 21/35, West Punjabi Bagh, New Delhi - 110026
14 Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road,Ahmedabad-15
15 LAWCRUX Advisors Pvt Ltd, LAW House,1-8,Sector - 10, Faridabad 121003 (Haryana)
16 Office Copy
17 Guard file

Assistant Registrar
(SM Appeal Branch)

THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI, PRINCIPAL BENCH NEW DELHI

Appeal No.E/1103 of 2008-SM (BR)

[Arising out of Order-in-Appeal No.78-CE/APPL./KNP/2008 dated 27.02.2008 passed by the Commissioner of Central Excise (Appeals), Kanpur]

Date of Hearing/ Decision:09.03.2010

For approval and signature:

Mr. M. Veeraiyan, Member (Technical)

1. Whether Press Reporters may be allowed to see CESTAT (Procedure) Rules, 1982.	:	Yes
2. Whether it should 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 Departmental authorities?	:	Yes

CCE, Kanpur ...Appellants
(Rep. by Shri V.K. Saxena, Advocate)

Vs.

M/s. Bee Kay Enterprises ...Respondent
(Rep. by Shri A.K. Dixit, Advocate)

CORAM: **Hon'ble Mr. M. Veeraiyan, Member (Technical)**

Final Order No. 321/2010 SM (BR)/Dated:09.03.2010

<u>Per M. Veeraiyan:</u>

This is an appeal by the Department against the order of the Commissioner (Appeals) No.78-CE/APPL./KNP/2008 dated 27.02.2008.

2. Heard both sides.

3. The relevant facts are that when the officers visited the factory premises of the respondent-company, they found shortage of stock of raw materials of 17,100 Kgs. of C.R. Coil/Sheets and 2500 Kgs. of H.R. Sheets totally valued at Rs.6,44,225/-. The Authorised Signatory, Shri Devendra Katiyar could not explain any reasons for the shortage and paid the duty involved amounting to Rs.1,05,138/- on 31.07.2006. Show cause notice was issued proposing confirmation of duty and imposition of penalty. The Original Authority confirmed the demand of duty as proposed in the show cause notice along with interest. However, he did not impose any penalty on the respondent as well as on Shri Devendra Katiyar, Authorised Signatory. The Department filed appeal seeking imposition of penalty under Section 11 AC. The Commissioner (Appeals) by the impugned order rejected the appeal of the Department. The Department has chosen to file the appeal against the concurrent findings of the Original Authority and the Commissioner (Appeals) in not imposing penalty under Section 11 AC.

4. Ld. Jt. CDR reiterates the grounds of appeal.

5. Ld. Advocate for the respondent strongly supports the order of the lower authorities in not imposing penalty.

6. I have carefully considered the submissions from both the sides. It is noticed that it was a case of shortage of raw materials found at the time of visit of the officers. Neither the show cause notice nor the reply to the show cause notice contain details of the stock as per the records so as to assess as to whether the shortage was minimal or significant. Under these

circumstances, the submission of the ld. Advocate that the shortage of raw materials was an accumulated shortage over a period of time and could be due to various reasons deserves to be accepted. The grounds of appeal also do not reveal any facts, which can upset the findings of the Original Authority and the Commissioner (Appeals). As the respondent failed to account for the raw materials on which credit has been taken, they were required to pay an amount equal to the credit taken on such inputs. There is no dispute about liability to payment of excise duty and interest involved on the shortages. However, the submission on behalf of the Department to presume such shortages as clandestine removal and to impose penalty under Section 11 AC cannot be accepted in the absence of the evidence corroborating such clandestine removal. As the show cause notice do not indicate even the stock of inputs as per the records, it is not possible to ascertain whether the shortage was significant. No evidence about any clandestine removal as such has been relied upon. In view of the above, I hold that no valid grounds have been adduced to interfere with the concurrent findings of the Original Authority and the Commissioner (Appeals) against imposition of penalty against the respondent.

7. The appeal is, therefore, rejected.

Order dictated & pronounced in open court on 9.03.2010.

(M. Veeraiyan)
Member (Technical)

Ckp.