TELEGRAM : CEGCANAL
Website : www.cestat.gov.in

REGISTERED / AD
Email : delhi@cestat.gov.in

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066

SINGLE MEMBER APPEAL BRANCH

Date 08/04/2010

Appeal No. E/2945 – 2946 / 2007 –SM[BR]

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

To :
M/S K.P.FRAGRANCES
10-A, SECTOR-D, INDUSTRIAL AREA, BHOPAL

[2] SHRI AMIT SHARMA PROPRIETOR
M/S DURGA TRADING CO. H.NO.313
HATAI KHERA ROAD ANAND NAGA BHOPAL

Appellant

M/S K.P.FRAGRANCES

Vs

Respondent

C.C.E BHOPAL

I am directed to transmit herewith a certified copy of **Final order No**. 391 – 392 / 2010-SM[BR] dated 31.3.2010 passed by the Tribunal under Section 35-C(1)of Central Excises Act, 1944

Assistant Registrar
(SM Appeal Branch)

Copy to :

1. Respondent
   C.C.E BHOPAL
   HOSHANGABAD ROAD, 48, ADMINISTRATIVE AREA, AREA HILLS, BHOPAL (M.P.) 462011
2. Adv. / Consult
   MR.Z. U. ALVI
   D-8,BDA COLONY, ADJACENT GARUDA TRAVELS. KOH-E-FIZA BHOPAL-01

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)

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
WEST BLOCK NO.II, R.K. PURAM, NEW DELHI-110066.
SINGLE MEMBER BENCH

Excise Appeal No.E/2945-2946/2007

(Arising out of Order-in-Appeal No.91-CE/BPL/07-08 dated 30.08.2007 passed by the Commissioner (Appeals), Customs & Central Excise, Bhopal)

Date of Hearing: 24.02.2010
Date of Decision: 24.02.2010

M/s. K.P. Fragrances
Shri Amit Sharma, Proprietor — Appellant

Vs.

CCE, Bhopal — Respondent

Present for the Appellant: Shri Z.U.Alvi, Advocate
Present for the Respondent: Shri I.Baig, SDR

Coram: Hon'ble Mr. D.N.Panda, Judicial Member

Final **ORDER NO.** 391 – 392/2010 SM (Br)

PER: D.N.PANDA

The dispute in these two appeals is only in respect of penalty imposed under Section 11AC on M/s.K.P. Fragrances to the tune of Rs.3,06,233/- and penalty of Rs.25,000/- imposed on Shri Amit Sharma.

2. Ld.Counsel submits that there was no evidence to bring the appellant M/s.K.P. Fragrances to the fold of penalty. There was only short payment of duty without attributing malafide intention. Therefore penalty is not imposable. He refers to the provisions contained in Section 11AC of Central Excise Act, 1944 read with judgement of the Hon'ble Delhi High Court in the case of K.P. Pouches for grant of concessional penalty even if there is imposition of penalty.

3. So far as penalty on Shri Amit Sharma is concerned, submission of learned Counsel is that on 20.3.2006 during visit

by the investigating team the appellant was absent. There was non accountal of goods purchased. Reliance was placed by Revenue on the statement recorded from Shri Amit Sharma and that was extracted in show cause notice. When there was no discrepancy found, there was no penalty imposable on him.

4. In the course of hearing, ld. Counsel placed reliance on the judgement of Hon'ble High Court of Punjab & Haryana in the case of CCE vs. M/s. Shipley Hosiery Industries in CEA No.89 of 2009 disposed on 27.1.2010 and submitted that penalty to the extent of 25% can be paid beyond period of 30 days to avail concession under Section 11AC of Central Excise Act, 1944.

5. On the other hand Revenue's pleading is that when there is penalty leviable under Section 11AC, no concession should be granted to the assessee. Only if duty and interest is paid within stipulated date, concession is given under the law. Considering the decision in the case of K.P. Pouches Pvt.Ltd. vs. Union of India-2008 (228) ELT 31 (Del) and also the decision of Apex Court in the case of Union of India vs. Dharmendra Textile Processors-2008 (231) ELT 3 (SC), Single Bench of Tribunal at Chennai discarded the pleading of concessional penalty in the case of CCE, Chennai vs. Ponneri Steel Industries-2009 (238) ELT 295.

6. So far as penalty on Shri Amit Sharma is concerned, ld.SDR submits that when there is categorical finding in para 10 of the appellate order, the appellant shall not get any concession in the levy of penalty.

7. Heard both sides and perused the records.

8. The ratio laid down by Hon'ble High Court of Delhi in the case of K.P. Pouches Pvt.Ltd. vs. Union of India-2008 (228) ELT 31 (Del). It is explicit that option to be made available to the Assessee to avail concession in penalty. In absence of such option granted there will be denial of justice.

9. Perusal of order of Single Member Bench of Chennai does not throw light whether para 27 of the judgement of Hon'ble High Court of Delhi in the case of K.P. Pouches' case (supra) had received consideration. Once there is no consideration of the ratio laid down by Hon'ble High Court of Delhi, Revenue's reliance on the judgement of Ponneri Steel Industries (supra) is not profitable. Following anxiety of Hon'ble High Court of Delhi as expressed in the judgement of K.P. Pouches' case, it is necessary to carry out mandate of the statute as that has been directed by Hon'ble High Court. Such direction not being followed, the appellant deserves to be dealt in accordance with law for grant of an option to discharge penalty under section 11AC of Central Excise Act, 1944.

10. So far as penalty on Shri Amit Sharma is concerned, enquiry was conducted as to whether he had reconciled the discrepancy found on 20.03.2006 by Investigation Authority. The Appellant placed reliance on para 9 of show cause notice for its defence. Para 9 of show cause notice clearly brought role of Shri Amit Sharma about the consignment relating to his proprietary concern covered by Invoices No.94/14.3.2006, 95/16.3.2006, 96/17.3.2006 and 97/18.3.2006. Statement was recorded from him two months later. There was sufficient time for the appellant to explain the reasons of discrepancy to the authorities. Mere absence of appellant on 20.3.2006 i.e. the date of investigation does not provide any basis or cogent reason to

consider any concession in penalty to be granted to him. Therefore his appeal is dismissed.

11. When the ld.Counsel has relied on the judgement of Hon'ble High Court of Punjab & Haryana in the case of CCE vs. M/s. Shipley Hosiery Industries cited supra, it is proper to take note of the question that was before Hon'ble High Court in that case which reads as follows:

> *"When CESTAT is correct in allowing the benefit of penalty upto 25% of the duty amount in the case when the penalty so determined was not paid by the parity within the period of thirty days which is the pre-requirement to avail such benefit as per the second proviso to Section 11AC?"*

12. Hon'ble High Court has followed its decision in the case of J.R.Fabrics (P) Ltd. and the decision of Hon'ble Delhi High Court in the case of Malbro Appliances Pvt.Ltd. as well as K.P. Pouches Pvt.Ltd. and dismissed the appeal noticing clearly that Revenue has failed to show any contrary view of jurisdictional court or Apex Court. The Court reiterated its view what was held in the case of J.R.Fabrics (P) Ltd. and case of Malbro Appliances Pvt.Ltd.

13. Once the question framed above was answered by the above judgement against Revenue, reliance on Single Bench decision in the case of CCE, Chennai vs. Ponneri Steel Industries-2009 (238) ELT 295, by Revenue is of no help to them.

14. In the result, both appeals are disposed off in the above terms.

(D.N.PANDA)
JUDICIAL MEMBER

mk