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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/5297/2008 – SM[BR] Date 13/05/2010

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

To :
M/S GANGES PACKERS
47-A, DADA NAGAR KANPUR

M/S GANGES PACKERS Appellant
Vs
C.C.E. KANPUR Respondent

I am directed to transmit herewith a certified copy of **Final order No.** 518 / 2010 –SM[BR] dated 20.4.2010 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. KANPUR
   117/7, SARVODAYA NAGAR, KANPUR 208005.
2. Adv. / Consult
   SHRI RAJESH JAIN ADV.
   A-2/142, SAFDARJUNG ENCLAVE NEW DELHI-29.
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. Company Law Institute of India Pvt Ltd.,No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
9. M/s. Deeparchie Publications, M-93, Marg. 46, Saket, New Delhi 110017
10. Taxmann Allied Service Pvt Ltd., 59/32, New Rohtak Road, New Delhi - 110005
11. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road,Ahmedabad-15
12. LAWCRUX Advisors Pvt Ltd, LAW House,1-8,Sector - 10, Faridabad 121003 (Haryana)
13. Office Copy
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15. TAXINDIAONLINE. COM PVT. LTD. UNIT NO.1, 2ND FLOOR,VASANT ARCAD, NELSON MANDELA ROAD, VASANT KUNJ NEW DELHI-70.

Assistant Registrar
(SM Appeal Branch)

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No.2, R.K.Puram, New Delhi-110066.
Principal Bench, New Delhi.

E/529/08-SM

[Arising out of Order-in-Appeal No.376-377/CE/APPL/KNP/2007 dt.30.11.07 passed by Commissioner(Appeals), Kanpur)

For approval and signature

Hon'ble Mr. Rakesh Kumar, Member Technical

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: :

M/s. Ganesh Packers — Appellant

Versus

CCE, Kanpur — Respondent

Appearance
Sh. Rajesh Jain, Adv. For Appellant
Sh. I. Baig, DR For Respondent

Final Date of decision: 20.4.2010
Order No. 518/2010 SM (BR)

Per Rakesh Kumar

The facts leading to this appeal are, in brief, as under:

1.1 The Appellants are engaged in the manufacture of Corrugated Cartons. On 23.2.06, the factory premises of the Appellant was visited by the jurisdictional Central Excise Officers who checked the stock of the raw material as well as finished goods – Corrugated Cartons. While no discrepancy was found in the stock of the raw-material, on checking the stock of finished goods – Corrugated Cartons as against balance of 58287. in RG.I Register, only 23617 cartoons were found and as such there were shortage of 34670 cartoons involving Central Excise Duty of Rs.1,52,770/-. The physical stock verification had been done in the presence of two independent panch witnesses as well as Shri Azad Poddar, Authorised Signatory of the Appellant company and as per the Panchnama, he accepted the shortage. Subsequently, statement of Shri Azad Poddar was recorded under Section 14 of Central Excise Act,1944 wherein he stated that cartons found short might have been removed by the workers without payment of duty in his absence and he promised to pay the duty on the same. Subsequently, since the duty was not paid, a show cause notice was issued to the Appellant for recovery of the duty amounting to Rs.1,52,770/- alongwith interest on the cartons found short and also imposition of penalty on them under Section 11AC read with Rule 25 of Central Excise Rules. The show cause notice alleged that the cartons found short have been clandestinely removed.

1.2 The show cause notice was adjudicated by the Asstt. Commissioner vide order-in-original dt.29.1.07 by which the duty demand was confirmed alongwith interest and besides this, penalty of equal amount of Rs.1,52,770/- was imposed on the Appellant company as well as on Shri Azad Poddar of the Appellant company. On appeal to Commissioner(Appeals) against this order of the Asstt. Commissioner, Commissioner(Appeals) vide order-in-appeal No.376-377/CE/07 dt.30.4.07 upheld the duty demand as well as the penalty on the Appellant Company but penalty on the authorized signatory was set aside. It is against this order of the Commissioner(Appeals) that the present appeal has been filed by the Appellant.

2. Heard both sides.

2.1 Sh. Rajesh Jain, Advocate, learned Counsel for the Appellant company pleaded that the Panchnama does not mention as to how the stock of the cartons was ascertained, that the stock had been ascertained on eye estimation, though this fact is not mentioned in the Panchnama, that even though stock verification had been done in the presence of Sh. Azad Poddar, Authorised Signatory of the Appellant company and Panchnama does not mention as to whether he had objected to the method of determining the stock, this does not mean that the mistake in determining the stock of the finished goods cannot be pointed out subsequently; that there was no actual shortage of the finished good, that no enquiry was made with the Directors of the Appellant company; that no enquiry has been made with the customers of the Appellant company; that the shortage alleged on the basis of eye estimation is not actual shortage; that in this regard he relies upon the judgment of the Tribunal in the cases of Agarwal Foundaries vs CCE, Hyderabad reported in 2007(207)ELT.278, Geekay Wires Pvt. Ltd. vs CCE, Hyderabad reported in 2006(200)ELT.86, Hans Metals Pvt. Ltd. vs CCE, Kanpur reported in 2006(199)ELT.521 and Aar Kay Industries vs CCE, Chandigarh reported in 2004(165)ELT.412; that in absence of any enquiry having been made with the customers, duty demand on the alleged shortage by treating the same as clandestine removal is not sustainable and in this regard, he relies upon the judgement of the Tribunal in the case of CCE, Ahmedabad vs Vivek Dyechem Inds. Pvt. Ltd. reported in 2002(150)ELT.801 and that just on the basis of shortage of finished goods and in absence of evidence of clandestine removal cannot be presumed that the goods found short had been clandestinely removed, and that in any case, there is no justification for imposition of penalty on the Appellant under Section 11AC. He also pleaded that the order of the Asstt. Commissioner indicate that a composite penalty under Section 11AC and Rule 25 of Central Excise Rules,2002 has been imposed which is not permissible and in this regard, he relied upon the judgment of the Tribunal in the case of Agarwal Pharmaceuticals vs CCE, Delhi reported in 2002(146)ELT.190.

2.2 Sh. V.K.Saxena,Ld.JCDR pleaded that stock of the cartons had been determined by physical counting, that the stock checking of the finished goods had been done in presence of Authorized Signatory of the Appellant Company and also in the presence of Panch witnesses, that neither in the Panchnama, there is any objection recorded of Sh. Azad Poddar, Authorised Signatory, that the stock had not been correctly determined nor Sh. Azad Poddar has made any such complaint, that the shortage is more than 50% for which no explanation has been given by the appellants other than removal without payment of duty without knowledge of the management; in view of this, this is a clear case of clandestine removal of the finished goods without payment of duty and hence the duty demand has been rightly confirmed and penalty under Section 11AC on the Appellant has been rightly upheld, that the judgments of the Tribunal regarding determination of the stock of finished goods by eye estimation are not applicable to the facts of this case, ~~and~~ as in all those cases, it is on record that the quantity of the stock had been determined through eye estimation, while there is no such indication in this case, that the stock of cartons had been determined without counting the same and through eye estimation only; that when there is huge shortage of the finished goods for which no valid explanation has been given, clandestine clearance without payment of duty has to be presumed and for this, there is no necessity to make enquiry with the customers; that the plea that the adjudicating authority has imposed a composite penalty on the Appellant company under Rule 25 and Section 11Ac of Central Excise Act is not correct, as from the order-in-original, it is clear that penalty of Rs.1,52,770/- has been imposed on the Appellant Company under the provisions of Section 11AC of Central Excise Act read with Rule 25 of Central Excise Rules,2002; that from the words of the order-in-original, it is clear that penalty has been imposed under Section 11AC and it is not a composite penalty under Section 11AC of Central Excise Act and Rule 25 of the Central Excise Rules, and that in view of this, there is no infirmity in the impugned order.

3. I have carefully considered the submission from both the sides and perused the records. The stock checking of the

finished goods in the Appellant company has been done in the presence of two independent panch witnesses and also the authorized signatory of the Appellant company. The Panchnama clearly mentioned that Shri Azad Poddar had accepted the shortage and subsequently in his statement dt.23.2.06 also, he not only accepted the shortage but has also explained that the shortage could be due to removal of the goods without payment of duty without his knowledge and in his absence. In his statement he had also promised that the duty on the goods found short would be paid. Thus, there is no indication either in the Panchnma or in the statement of authorized signatory that the quantity of the finished goods has been determined by the eye estimation and therefore, the plea of the Appellant that the quantity had been determined by eye estimation can not be accepted at this stage and hence the various judgments cited by the learned Counsel for the Appellant on this point are not applicable. As regards the plea of the Appellant that no enquiry was conducted with the customers, I am of the view that since the shortage of the finished goods represented more than 50% of the stock as per the RG.I register and no valid explanation for the shortage had been given and on the contrary, the authorized signatory of the Appellant has accepted that the shortage could be due to the removal of the goods in his absence without payment of duty, the same has to be treated as due to clandestine removal and the judgments of the Tribunal cited by the learned Counsel for the Appellant are not applicable to the facts of this case. As regards the contention of the Appellant that the penalty imposed on the Appellant is a composite penalty, I find that the Asstt. Commissioner has imposed penalty on the Appellant company under Section 11AC of the Central Excise Act read with Rule 25 of Central Excise Rules. The Appellant's objection would have been correct if the Asstt. Commissioner had used the word 'and' instead of 'read with'. Just because the Asstt. Commissioner for imposition of penalty has mentioned Section 11AC read with Rule 25 of Central Excise Rules,2002, the penalty imposed cannot be treated as a composite penalty under Section 11AC of Central Excise Act,1944 and Rule 25 of Central Excise Rules,2002. In view of the above discussion, I do not find any infirmity in the impugned order. The appeal is dismissed.

Order dictated in the open Court.

(Rakesh Kumar)
Member Technical

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