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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/1166/2009,1319/2009 – SM[BR] Date 15/12/2010

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

To :
M/S PHOOLCHAND SALES CORPORATION
24, BATASHE WALI GALI, AMINABAD, LUCKNOW.

M/S PHOOLCHAND SALES CORPORATION — Appellant
Vs
C.C.E. LUCKNOW — Respondent

I am directed to transmit herewith a certified copy of **Final order No.** 1426-1427 /2010-SM[BR] dated 2.12.2010 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. LUCKNOW
   7-A, ASHOK MARG, LUCKNOW.
2. Adv. / Consult
   MR.K.K.SHARMA,
   A-115, GROUND FLOOR, ASHOKA ENCLAVE, PART-II, SECTOR-37, FARIDABAD (HARYANA)
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. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
14. Office Copy
15. Guard file

Assistant Registrar
(SM Appeal Branch)

3. SMT. MADHURI CHAURASIA, PROP
M/S M.M. MARKETING, AMINABAD, LUCKNOW.

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

BENCH-SM

Date of Hearing/Decision:02.12.2010

Excise Appeal No.E/1166/09 SM

[Arising out of Order-in-Appeal No.29-31-CE/LKO/09 dated 24.02.2009 passed by the Commissioner (Appeals), Central Excise Lucknow].

For approval and signature:

Hon'ble Mr.M.Veeraiyan, 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?	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

M/s.Phool Chand Sales Corpn. ...Appellant

Vs.

Commissioner, Central Excise, Lucknow ... Respondent

Present for the Appellant :Shri K.K. Sharma, Advocate
Present for the Respondent:Shri.A.K. Gupta, SDR

Excise Appeal No.E/1319/09-SM

CCE, Lucknow ... Appellant

Vs.

Smt.Madhuri Chaurasia, Proprietor of
M/s. M.M.Marketing ...Respondent

Present for the Appellant : Shri.A.K. Gupta, SDR
Present for the Respondent: Shri K.K. Sharma, Advocate

Coram: Hon'ble Mr. M. Veeaiyan, Member (Technical)

Final **ORDER NO.** 1426-1427/2010 SM(BR) **DATED:02.12.2010**

PER: M. VEEAIYAN

1.1 Appeal No.1166/09 is by M/s.Phool Chand Sales Corporation against upholding of a demand of Rs.1,46,928/- alongwith interest and imposing equal amount of penalty.

1.2 Appeal No.1319 of 2009 is by the Department against the same order of the Commissioner (Appeals) by which a penalty of Rs.1,38,501 imposed on Smt. Madhuri Chaurasia, Proprietor of M/s.M.M. Marketing was set aside.

2. Heard both sides extensively.

3.1 Relevant facts in brief are that M/s. Phool Chand Sales Corporation is a manufacturer of pan-masala (Gutkha) marketed under brand-name Phool Chand Super, Phool Chand Gold & Phool Chand Deluxe. M/s. M.M. Marketing (with Smt. Madhuri Chaurasia as Proprietor) is a firm involved in marketing products manufactured by M/s.Phool Chand Sales Corporation. M/s. Priyadarshini Stores Gorakhpur is one of the dealers of products manufactured by M/s. Phool Chand Sales Corporation.

3.2 On 18.3.2004, Central Excise Officers visited the premises of Priyadarshani Stores and found 11 invoices issued by M/s.M.M. Marketing and the proprietor of M/s.Priyadarshini

Store confirmed receiving all these consignments from M.M. Marketing. On 15.6.2004, the premises of Phool Chand Sales Corporation and M.M. Marketing were visited and stock verification revealed excess in respect of certain categories of finished goods and shortage in respect of certain other categories of finished goods. The authorised signatory of M/s.M.M. Marketing, after confirming issuance of 11 bills recovered from Priyadharshini Store on 18.3.2004, submitted that only 6 bills were procured on payment of duty and goods covered by other 5 bills were for sale of goods procured from M/s.Phool Chand Sales Corporation without payment of duty. Authorised signatory of M/s.Phool Chand Sales Corporation have also admitted having cleared goods partly on payment of duty & party on without payment of duty to M/s.M.M. Marketing. Further M/s. Phool Chand Sales Corporation deposited Rs.38,501/- on 26.05.2004 and sum of Rs.10,02,000/- on 13.7.04.

3.3 Show cause notice dated 13.12.2004 was issued in respect of seized goods and subsequently further show cause notice dated 5.6.07 was issued proposing demand of duty and imposition of penalty on the concerned parties. Original Authority confirmed demand of Rs.1,46,928/- from M/s. Phoolchand Sales Corporation alongwith interest and imposed equal amount of penalty on the said manufacturer and imposed a penalty of Rs.1,38,501/- on proprietor of M/s.M.M. Marketing under Rule 26 of the Central Excise Rules 2002.

Commissioner (Appeals) upheld the order of the Original Authority in so far as the same related to M/s. Phool Chand Sales Corporation but set aside the penalty imposed on M/s. M.M. Marketing.

4. Ld. Advocate for the appellants for M/s. Phool Chand Sales Corporation submitted the following:-

(a) Since there were search operations on 18.03.2004 and 15.06.2004 and since the Department has completed the investigation before issuance of first Show-Cause-Notice dated 13.12.2004, the second Show-Cause-Notice issuedon 5.6.07 is time barred. He submits that no other statement has been taken after issuance of the first Show-Cause-Notice.

(b) The demand is sought to be fastened on M/s.Phoolchand Sales Corporation based on invoices issued by M/s. M.M. Marketing which were recovered from a third party namely Priyadharshini Store. The reliance placed on these documents is not appropriate. He also submits that if the goods were procured from M/s.Phool Chand Sales Corporation without payment of excise duty then M/s.M.M. Marketing would not have accounted them in the books of account and paid sales tax. These have not been appreciated by the authorities below. In respect of shortage of goods noticed, the Department has presumed that they were clandestinely removed without contacting any buyer or transporter of the alleged short found goods. He also submits that none have accepted that the short found goods have been cleared without payment of duty.

5.1. Ld. SDR submits that this is the clear case of clandestine removal established by excess stock and shortage of goods at different places and the confessional statements of the representative of the manufacturer, the marketing firm and the dealer. He also submits that none of them have retracted their statements.

5.2 As regards M/s. M.M. Marketing Company, ld. SDR submits that the penalty imposed by the Original Authority was in her capacity as Proprietor of M/s. M.M. Marketing. Involvement of M/s. M.M. Marketing, in procuring non-duty paid goods from M/s. Phool Chand Sales Corporation and selling to Priyadarshini Sale stand admitted and, therefore, Commissioner (Appeals) was not correct in setting aside the penalty.

6. Ld. Advocate for the Proprietor of M/s.M.M. Marketing submits that Madhuri Chaurasia is a house-wife and the day-to-day activity of the marketing firm has been looked after by her authorised representatives. Therefore, there was no

justification for imposition of penalty and he seeks upholding the order of the Commissioner (Appeals). Alternatively, he also pleas that the event of penalty being imposed a leniency may be given

7. Ld. Advocate also submits that M/s. Phool Chand Sales Corporation has paid the entire duty involved (much in excess of the disputed duty) before show cause notice was issued. Neither the Original Authority nor Commissioner (Appeals) have given option to pay concessional penalty in terms of proviso to section 11AC. Therefore, he seeks that the same may be provided in terms of judgement of Hon'ble High Court of Delhi in the case of K.P. Pouches Vs. Union of India reported in 2008 (228) ELT 31.

8. I have carefully considered the submissions from both sides and perused the records. I find that the Officers have searched the premises of Priyadharshini Sales, a dealer in Pan Masala and Gutkha and on follow up action subsequently searched the premises of the manufacturer and the marketing firm. The nature of discrepancies in stock at different premises has been detailed in the impugned order, which is not being disputed. The statements of the Authorised representatives of M/s.Phool Chand Sales Corporation, (the manufacturer), M/s. M.M. Marketing, (the marketing firm) and Priyadharshini Stores (the Dealer) clearly confirm the clandestine removal indulged in by the appellant company. I also noticed that these persons

and other persons who have given statements have not retracted the statements. On the other hand I find that M/s. Phool Chand Sales Corporation has acted upon the statements and paid substantial amounts before issuance of show cause notice. Under these circumstances, the charge of clandestine removal is established and duty has been rightly demanded. Further, in the facts and circumstances of this case, it is held to be a fit case for invocation of the provisions of section 11 AC and, therefore, penalty on M/s. Phool Chand Sales Corporation has been rightly imposed under section 11AC.

9. Regarding the setting aside of penalty on M/s. M.M. Marketing, Commissioner (Appeals) has not appreciated the fact that penalty has been imposed only on M/s.M.M. Marketing as the proprietary concern is not different from the Proprietor. Legally, Mrs. Madhuri Chaurasia is same as M/s.M.M. Marketing. The involvement of M/s. M.M. Marketing in abetting the evasion of duty by M/s.Phool Chand Sales Corporation is proved and, therefore, penalty is warranted on M/s. M.M. Marketing and naturally the penalty on M/s. M.M. Marketing is the penalty on the proprietor as proprietor is not different from the proprietary firm. However, some leniency in terms of penalty is justified considering that she was not directly looking after the firm.

10. The alternative submission of the ld. Advocate that M/s. Phool Chand Sales Corporation should be extended option to

pay a concessional penalty in terms of proviso to section 11AC deserves to be accepted.

11. In the light of the above, the appeals are disposed of as follows:-

(a) Appeal of M/s. Phool Chand Sales Corporation is rejected. However it is held that M/s. Phoolchand Sales Corporation have to pay a penalty of Rs.36,732/- only. As the appellant has paid substantial amounts much higher than the dues, the entire amount of duty involved and the 25% penalty shall be deemed to have been adjusted out of the amounts already deposited by the appellant.

(b) Appeal of the Department E/1319/09 is allowed. Order of the Commissioner (Appeals) is set aside. Penalty on Mrs. Madhuri Chaurasia is restored. While restoring the order of the Original Authority, the penalty imposed on her is reduced from Rs.1,38,501/- to Rs.50,000/- only.

(Dictated & Pronounced in the open Court)

(VEERAIYAN)
MEMBER (TECHNICAL)

Anita