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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/2830/2007 – SM[BR] E / CO / 137 / 2008 –SM[BR] Date 12/01/2010

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

To :
C.C.E ALLAHABAD
38,M.G.MARG, CIVIL LINES, ALLAHABAD

C.C.E ALLAHABAD Appellant

Vs

M/S BAJAJ HINDUSTAN SUGAR AND INDUSTRIES LTD. Respondent

I am directed to transmit herewith a certified copy of **Final order No**. 46 / 2010 –SM[BR] dated 29.12.2009 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 BAJAJ HINDUSTAN SUGAR AND INDUSTRIES LTD.
PRATAPPUR, DEORIA (U.P),FORMERELY, THE PRATPPUR SUGER & INDUSTRIES LTD.)

2. Adv. / Consult SHRI. BIPIN GARG ADV.
B-1/1289-A, VASANT KUNJ NEW DELHI

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
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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/2830/07-SM and E/CO/137/08

[Arising out of Order-in-Appeal No.161-CE/Alld/07 dt.28.8.07 passed by the Commissioner of Central Excise, Allahabad)

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:

CCE, Allahabad — Appellant

Versus

M/s. Bajaj Hindustan Sugar And Inds. Ltd. — Respondent

Appearance

Sh. S.R.Meena, DR for Appellant
Sh. Atul Gupta, Company Secretary for Respondent

Final

Date of decision: 29.12.09
Order No. 46/2010 SM(BR)

Per Rakesh Kumar:

This is a Revenue's appeal against order-in-appeal No.161-CE/Alld/2007 dt.28.8.07 passed by Commissioner(Appeals), Allahabad by which the

Commissioner(Appeals) dismissed the Department's review appeal for enhancement of penalty under Rule 25(1) of Central Excise Rules,2002 and besides this also dismissed the memorandum of cross objection filed by the respondent before the Commissioner(Appeals) observing that the respondent in their memorandum of cross objection have seized the opportunity to drag the whole issue of order-in-original which is beyond the scope of present departmental appeal. The respondent have filed the cross objection in which they have challenged the main issue – confirmation of duty demand of Rs.27,446/- on alleged shortage of 316.57 quintals of Brown Sugar detected at the time of officers visit to the factory.

2. Heard both the sides.

2.1 Shri S.R.Meena, learned DR pleaded that the quantity 316.57 quintals of Brown Sugar found short in the course of stock checking by the officers had been clandestinely removed without payment of duty; that in view of this, the Asstt. Commissioner while adjudicating the matter, had rightly confirmed the duty demand of Rs.27,446/- besides imposition of penalty of Rs.5,000/- on the respondent; that the Commissioner(Appeals)'s order dismissing the Department's appeal for enhancement of penalty to Rs.10,000/- is contrary to the provisions of Rule 25(1) of Central Excise Rules,2002 as minimum penalty prescribed under this Rule is Rs.10,000/- and penalty less than this amount can not be imposed; that the cross objection filed by the respondent before the Tribunal in which the duty demand itself has been challenged merits rejection as the respondent did not file any appeal before Commissioner(Appeals) against the Asstt. Commissioner's order confirming the duty demand and in course of proceedings before the Commissioner(Appeals) had only filed the cross objection wherein the issue of confirming duty demand on shortage of Brown Sugar had been raised but the same was rejected by the Commissioner(Appeals); that the respondent have not filed any appeal before the Tribunal against the Commissioner(Appeals)'s order rejecting their plea with regard to duty demand raised in the memorandum of cross objection filed before the Commissioner(Appeals) and that in view of this, at this stage, the respondent's plea with regard to confirmation of duty demand on shortage of brown sugar cannot be considered

2.2 Shri Atul Gupta, Co. Secretary, learned Counsel for the respondent pleaded that so far as the issue of penalty enhancement to a minimum of Rs.10,000/- is concerned, this issue has already been decided by the Larger Bench of the Tribunal in the case of CCE, Bhopal vs Rama Wood Craft(P) Ltd. reported in 2008(225)ELT.348(Tri.-LB) wherein the Tribunal held that what Rule 25(1) of Central Excise Rules,2002 prescribes is an upper limit of penalty and within this upper limit, the adjudicating authority has discretion to impose any penalty; that in view of this, the Revenue's appeal for enhancement of penalty has been rightly dismissed by the Commissioner(Appeals); that Commissioner(Appeals) while disposing of the Revenue's appeal for enhancement of penalty has wrongly dismissed the respondent's plea with regard to duty demand raised in the memorandum of cross objection; that though the respondent had not filed any appeal against Asstt. Commissioner's order confirming the duty demand, when the Revenue filed a review appeal before the Commissioner(Appeals) for enhancement of penalty, the respondent as per the provisions of Section 35E(4) of Central Excise Act filed a memorandum of cross objection and in respect of this memorandum of cross objection, as per the provisions of this sub-section, the provisions of sub-section (4) of Section 35B are applicable, that as per the provisions of section (4) of Section 35B, on receipt of notice, that appeal has been referred under Section 35B, the party against whom appeal has been preferred, may, notwithstanding that he may not have appealed against such order or any part thereof, file, within 45 days on receipt of the notice, a memorandum of cross objection verified in the prescribed manner against any part of the order appealed against and such memorandum shall be disposed of by the Tribunal as it were an appeal presented within the time specified in sub-section (3); that in view of this provision of sub-section (4) of Section 35B read with sub-section (4) of section 35E, the plea regarding wrong confirmation of the duty demand on alleged shortage of brown sugar raised in the memorandum of cross objection filed before Commissioner(Appeals) should have been considered by the Commissioner(Appeals) and should not have been dismissed on the ground that the respondent cannot raise this plea and that in view of this, the issue of confirmation of duty demand is required to be remanded back to the Commissioner(Appeals) for denovo consideration. Shri Gupta cited the judgment of the Tribunal in the case of Ispat Traders vs CC, Jamnagar reported in 2009(235)ELT.111 wherein in para 5.4 of the order, the Tribunal observed that when the order is partly favourable to the assessee and partly favourable to the Department, both may come in appeal within the specified time; that if one of them does not file appeal within the specified time and the other chooses to file an appeal, then the other party also gets an opportunity to re-open the issue decided against them by filing cross objection within 45 days on receipt of notice about filing of the appeal. Shri Gupta pleaded that the ratio of this judgment of the Tribunal is squarely applicable to the facts of this case.

3. I have carefully considered the submissions from both the sides and perused the records. In this case, the appellant's factory was visited by the Departmental Officers on 8.4.06 and in course of stock checking, shortage of 316.57 quintals of brown sugar was detected vis-à-vis records maintained by the respondent. The duty involved on the shortage was Rs.27,446/-. The Asstt. Commissioner

vide order-in-original dt.9.1.07 confirmed the duty demand of Rs.27,446/- alongwith interest on it and besides this imposed penalty of Rs.5,000/- on the respondent under Rule 25(1) of Central Excise Rules,2002. In course of adjudication proceedings before the Asstt. Commissioner, the respondent had challenged the shortage but their plea was not accepted by the Asstt. Commissioner. Though no appeal against the confirmation of duty demand on alleged shortage of 316.57 quintals of brown sugar was filed by the respondent before the Commissioner(Appeals), the Department filed a review appeal to the Commissioner(Appeals) for enhancement of penalty on the ground that as per the provisions of Rule 25(1), the minimum penalty which can be imposed, is Rs.10,000/- and penalty below this amount cannot be imposed. The respondent filed a memorandum of cross objection as per the provisions of sub-section(4) of Section 35B of Central Excise Act within the stipulated period. Sub-section(4) of Section 35E provides that where in pursuance of order sub-section(1) or sub-section(2) of Section 35E the adjudicating authority, or an authorized officer makes an application to the appellate Tribunal or Commissioner(Appeals) within the period of three months from the date of communication of the order under sub-section(1) or sub-section (2) for the adjudicating authority ~~[illegible]~~, such application shall be heard by the Appellate Tribunal or Commissioner(Appeals) as the case may be, as if such application were an appeal made against the decision or order of the adjudicating authority and the provisions of this Act regarding appeal including the provisions of sub-section (4) of Section 35B, shall so far as may be, apply to such application. Thus when review appeal has been filed by the Department before the Tribunal or Commissioner(Appeals) under Section 35B(1) or Section 35B(2) read with Section 35B(4), the same is treated as appeal filed by the Department against the order passed by the adjudicating authority and in respect of this appeal, the provisions of sub-section(4) of Section 35B would be applicable. Sub-section(4) of Section 35B provides that on receipt of notice that appeal has been preferred, the party against whom the appeal has been preferred may, notwithstanding that he may not have appealed against such order or any part thereof, file, within 45 days from the receipt of the notice, memorandum of cross objection verified in the prescribed manner against the appeal and such memorandum shall be disposed of by the appellate Tribunal as if it ~~was~~ were an appeal presented within the time specified within sub-section(3). Since in respect of review appeal filed by the Department before the Commissioner(Appeals) under Section 35E(4) read with Section 35E(2), the provisions of Section 35B(4) are applicable, the respondent on receipt of notice about the department's appeal against the Asstt. Commissioner's order, should get opportunity to file a memorandum cross objection within the time limit of 45 days prescribed under Section 35B(4). In this case, the respondent filed cross objection within the stipulated period wherein besides opposing the plea of the Revenue of enhancement of penalty, they also challenged the confirmation of duty demand on alleged shortage of brown sugar. When such a cross objection had been filed, the Commissioner(Appeals) should have dealt with all the pleas raised in it as the same has to be treated as appeal. If the order is partly favourable to the assessee and partly favourabe to the Department and the assessee does not file an appeal within the specified time but the department chooses to file the appeal against the findings adverse to it, the other side, as per the provisions of Section 35E(4) read with Section 35B(4) gets an opportunity to file a memorandum of cross objection in which they can reopen the issue decided against them. I find that same view has been taken by the Tribunal in the case of Ispat Traders(Supra). In view of this, I hold that the Commissioner(Appeals)'s order holding that the respondent in the cross objection cannot plead the whole issue of the impugned order in original and that their plea is required to be limited only to the question of penalty, is not correct.

4. In view of the above discussion while the Revenue's appeal for enhancement of penalty is dismissed, the cross objection filed by the respondent is allowed and the Commissioner(Appeals) is directed to consider the Respondent's plea with regard to confirmation of duty

demand on alleged shortage of brown sugar on merit. The cross objection filed by the respondent stands disposed of as above.

5. Matter is remanded to Commissioner(Appeals) for considering the respondent's plea with regard to confirmation of duty demand on alleged shortage of brown sugar.

Order dictated in the open Court.

(Rakesh Kumar)
Member(Technical)

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