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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/577 /2008-578 /2008 – SM[BR] Date 12/01/2010

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
SHRI MOHD ISLAM, PROPRIETOR Respondent

I am directed to transmit herewith a certified copy of **Final order No**. 55 – 56 / 2010-SM[BR] dated 6.1.2010 passed by the Tribunal under Section 35-C(1)of Central Excises Act, 1944

Assistant Registrar
(SM Appeal Branch)

Copy to :
1. Respondent

1. SHRI MOHD ISLAM, PROPRIETOR
2. SHRI GOVIND DAS, AUTHORISED SIGNATORY
M/S JAIHIND BIDI CO.MAIN ROAD, RANIPUR,JHANSI.H.O.27/1, CHANNIYAPURA,INSIDE ORCHHA GATE,JHANSI-28400

2. Adv. / Consult
NONE;--------------

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)
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Assistant Registrar
(SM Appeal Branch)

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

West Block No.2, R.K.Puram, New Delhi

COURT-III

Date of hearing/decision: 6.1.2010

Central Excise Appeals No.577 & 578 of 2008-SM

Arising out of the order in appeal No.401-CE/APPL/KNP/2007 dated 23.1.2008 passed by the Commissioner (Appeals), Customs & Central Excise, Kanpur.

For Approval and Signature:

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

1	Whether Press Reporter 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 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

C.C & C.Ex., Kanpur ... Appellant

Vs.

1. Shri Mohd. Islam, Proprietor of Jai Hind Bidi Company
2. Shri Govind Das, Authorised Signatory of Jai Hind Bidi Company

... Respondents

Appearance:

Shri S.K. Bhaskar, Authorized Departmental Representative (JDR) for the Revenue and none for the respondents [on merits]

Coram: Hon'ble Shri M. Veeraiyan, Member (Technical)

Oral Order No. 55-56/2010 SM (BR)

Per M. Veeraiyan:

These two appeals by the Department are against the same order in appeal dated 23.1.2008. These appeals involve two respondents and none appears for the respondents. However, there is a communication from one of the respondents namely, Shri Mohd. Islam seeking decision on merits.

2. Heard the learned DR who reiterates the grounds of appeal.

3. The background leading to filing of these two appeals is worth recording. The original authority, in a case involving demand of duty of Rs.16,821/- against M/s Jai Hind Bidi Co. besides confirming the demand of duty and interest imposed penalty of Rs.16,821/- under Section 11AC on the said firm and in addition, imposed a penalty of Rs.2,000/- on Shri Mohd. Islam, proprietor of M/s Jai Hind Bidi Co. under Rule 26 of Central Excise Rules, 2002. He also imposed penalty of Rs.2000/- on Shri Govind Das authorised signatory of M/s Jai Hind Bidi Co. under Rule 26 of Central Excise Rules, 2002.The Commissioner took up the order for review under Section 35E(2) and directed filling of appeal to the Commissioner (Appeals) seeking enhancement of the penalty from Rs.2,000/- each to Rs.10,000/- on Shri Mohd. Islam and Shri Govind Das. Accordingly, the appeals were filed before Commissioner (Appeals). Commissioner (Appeals) vide impugned order dated 29.11.2007 held that Rule 26 does not prescribe minimum penalty of Rs.10,000/- as claimed by the Department and rejected the appeals. The said order has been considered by the Committee of Commissioners and vide order dated 13.2.2008, the Committee directed the Joint Commissioner to file appeal before CESTAT. Accordingly, the appeals stand filed.

4.1 I have carefully considered the submissions and perused the records. The Department has chosen to file appeal against the concurrent findings of original authority and Commissioner (Appeals) on a issue not involving any revenue implication.

4.2 It is noticed that the original authority has imposed a separate penalty on the proprietor Mohd. Islam in addition to penalty on the proprietary concern. However, it appears that there is no appeal filed by Shri Mohd. Islam before Commissioner (Appeals).

4.3 The Commissioner (Appeals) has held that there is no minimum penalty prescribed under Rule 26 of Central Excise Rules, 2002 with the following findings:

> " ***The department has pleaded that minimum penalty of Rs.10,000/- should have been imposed u/r 26 of Central Excise Rules, 2002. A minute observation of the penal provisions reveals that the words used in said Rule 26 are "............not exceeding the duty on such goods or rupees ten thousand whichever is greater", which indicates that the penalty should not exceed the amount of duty involved or Rs.10,000/-***

whichever is greater. No word or phrase has been used to indicate that the quantum of penalty mentioned in said Rule 26 is minimum or mandatory.

Under the circumstances, I am of the opinion that under the said Rule 26, only maximum limit of penalty has been prescribed, below which, the quantum of penalty is discretionary & without any minimum limit. I observe that under the circumstances of the case, the Adjudicating Authority has correctly used his discretion in the circumstances of the case, I find no justification in enhancement of penalty."

4.4 In spite of the above reasoning given by the Commissioner (Appeals), the Committee of Commissioners have directed filing of the appeal. The prayer in the appeal memorandum reads as follows:

"1. Set aside the Order - in-Appeal No. 401-CE/APPL/KNP/2007 dated 23.1.2008 in respect of Shri Mohd. Islam, Proprietor of M/s Jai Hind Bidi Company, Main Road, Ranipur, Jhansi.
2. Uphold the Review Order No.40-Review/2007 dated 01.11.2007 passed by the Commissioner , Central Excise , Kanpur, or ;
3. Pass such other orders as deemed appropriate."

5. Not only the appeals have been filed casually, the prayers have been made without applying mind. Upholding the Review Order dated 1.11.2007 would only lead to permitting the department to file appeal before Commissioner (Appeals). Appeal has already been filed before Commissioner (Appeals) and the Commissioner (Appeals) has given his decision. Under these circumstances, the prayer has no meaning. Filing of such appeals deserves to be discouraged, to say the least.

6.1 Rule 26 of Central Excise Rules, 2002 reads as under:

*"RULE 26. Penalty for certain offences. — [(1)] Any person who acquires possession of, or is in any way concerned in transporting, removing, depositing, keeping, concealing, selling or purchasing, or in any other manner deals with, any excisable goods which he knows or has reason to believe are liable to confiscation under the Act or these rules, shall be liable to a penalty not exceeding the duty on such goods or *[two thousand rupees], whichever is greater.*

[(2) Any person, who issues –

(i) an excise duty invoice without delivery of the goods specified therein or abets in making such invoice; or
(ii) any other document or abets in making such document, on the basis of which the user of said invoice or document is likely to take or has taken any ineligible benefit under the Act or the rules made thereunder like claiming of CENVAT credit under the CENVAT Credit Rules, 2004 or refund, shall be liable to a penalty not exceeding the amount of such benefit or five thousand rupees, whichever is greater.]"

6.2 The Larger Bench of the Tribunal in the case of C.C.E., Bhopal vs. Rama Wood Craft (P) Ltd. reported in 2008 (225) ELT 348 has held that there is no minimum prescribed in Rule 25 of Central Excise Rules, 2002 while interpreting the words " shall be liable to penalty not exceeding duty on the excisable goods .... or rupees ten thousand whichever is greater". The wordings in relation to quantum of duty in Rule 26 is also identical. Therefore, it is clear that there is no minimum penalty prescribed under Rule 26 of the Central Excise Rules.

7. In view of the above, I do not find any merits, whatsoever, in the appeals filed by the Department which are against the concurrent finding of the original authority and Commissioner (Appeals) which is favourable to the party .

8. Appeals by the Department are rejected.

(M. Veeraiyan)
Member (Technical)

scd/