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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/833 - 834 / 2008-SM[BR] Date 12/02/2010

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

M/S BENARA UDYOG LTD. Respondent

I am directed to transmit herewith a certified copy of **Final order No.** 200 – 201 / 2010 –SM[BR] dated 5.2.2010 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 BENARA UDYOG LTD.

BHARATPUR ROAD, BODLA AGRA.

2. Adv. / Consult SHRI K.K. ANAND ADV.
A-5, BASMENT LAJPAT NAGAR –III
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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2. SH. VIJAY SARASWAT, AUTH. SIGNATORY
M/S BENARA UDYOG LTD., BHARATPUR ROAD, BODLA
AGRA.

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: 5.2.2010

Customs Appeals No.833, 834 of 2008-SM

Arising out of the order in appeal No.55-56/CE/APPL/KNP/2008 dated 21.2.2008 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.

M/s Benara Udyog Ltd. ... Respondents
Shri Vijay Sarswat,(Authorised Signatory)

Appearance:

Shri R.K. Saini, Authorized Departmental Representative (JDR) for the Revenue and Shri Hemant Bajaj, Advocate for the respondent

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

Final Oral Order No. 200 - 201 - SM (BR)

Per M. Veeraiyan:

This is an appeal by the Department against the order of Commissioner (Appeals) No.55-56/CE/APPL/KNP/2008 dated 21.2.2008.

2. Heard both sides.

3. The Central Excise Officers visited the factory premises of the respondent company on 28.9.05 and found stock of 34,200 kgs. of Bi-metal

strips as against the balance as per record of 40,600 kgs. and thus there was a shortage of 6400 kgs. valued at Rs.7,79,950/-. The authorised signatory Shri Vijay Sarswat in his statement dated 28.9.05 admitted the shortage and explained that the shortage was due to clearance of the same without preparing invoices and without payment of duty. The statement was not retracted. On the other hand, the entire amount of duty involved amounting to Rs.1,24,792/- along with education cess of Rs.2,496/- stands deposited on 6.10.2005. On the basis of show cause notice dated 14.8.06, the original authority confirmed the demand and appropriated the amount already paid. He ordered for recovery of interest. He also imposed a penalty of Rs.1,27,288/- on the respondent company. He also imposed a penalty of Rs.10,000/- on Shri Vijay Sarswat, authorised signatory of the company. The Commissioner (Appeals) relying on the decision of Hon'ble Punjab & Haryana High Court in the case of M/s Sigma Steel Tubes - 2007 (218) ELT 657 (P & H) held that no penalty is imposable. Hence the Department is in appeal.

4. Learned DR submits that substantial shortage of finished goods was found and the authorised signatory admitted the clandestine removal. Merely because the duty has been paid before issue of show cause notice, the penalty cannot be waived.

5. On the other hand, the learned Advocate for the respondent submits that shortage was only in respect of bi-metal strips and other goods were found to tally as per stock. No other evidence is available corroborating clandestine removal. In view of the above, he seeks upholding the order of the Commissioner (Appeals). Alternatively, he submits that the benefit of reduced penalty in terms of the proviso to Section 11AC should be given to them following the decision of the Hon'ble High Court of Delhi in the case of K.P. Pouches (P) Ltd. vs. UOI reported in 2008 (228) ELT 31 (Del.). He also submits that there is no specific allegation against the authorised signatory. He was an employee and was not beneficiary of evasion, if any. Therefore, he

seeks upholding the order of Commissioner (Appeals) setting aside the penalty of Rs.10,000/- imposed on him.

6.1 I have carefully considered the submissions from both sides. It is not disputed that there was shortage of finished goods on the date of visit by the officers. The authorised signatory has admitted clandestine removal of goods found short in his statement given on 28.9.05. After a few days they also paid the entire duty involved. There is no retraction of the statement by the authorised signatory. Even in reply dated 29.1.2007 to the show cause notice, the version given by the authorised signatory that there was clandestine removal was not disputed. The submission that no show cause notice should have been issued in terms of Section 11A(2B) is clearly not acceptable as the case is one of admitted clearance of excisable goods without issue of invoice and without payment of duty. In view of the above, the order of the Commissioner (Appeals) in setting aside the penalty on the respondent company is not justified. However, the submission of the learned Advocate that they should be given the benefit of reduced penalty following the decision of the Hon'ble High Court of Delhi in the case of K.P. Pouches (P) Ltd. deserves to be accepted.

6.2 As regards Shri Vijay Sarswat, authorised signatory it is clearly coming that he had knowledge of clearance without invoice and without payment of duty. He was an authorised signatory of the company and he was in-charge of day to day work of the unit. Therefore, some penalty is also warranted on him.

7. In view of the above, the order of the Commissioner (Appeals) is set aside and order of the original authority is restored. While restoring the order of the original authority, I direct that the penalty imposed under Section 11AC read with Rule 25(2) of the Central Excise Rules shall be reduced to 25% of the penalty of Rs.1,27,288/- that is to Rs.31,822/- (rupees thirty one thousand eight hundred twenty two only). Penalty imposed on Shri Vijay Sarswat is reduced from Rs.10,000/- to Rs.5,000/- (rupees five thousand

only). Other portion of the order of the original authority is not interfered with.

8. The appeal is disposed off, as above.

(M. Veeraiyan)
Member (Technical)

scd/