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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/825 /2008 – SM[BR] Date 15/02/2010

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 SS.S.POLYFILMS (P) LTD Respondent

I am directed to transmit herewith a certified copy of **Final order No**. 223 / 2010 –SM[BR] dated 9.2.2010 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 SS.S.POLYFILMS (P) LTD

   PLOT NO 45,UPTRON INDUSTRIAL ESTATE, PANKI, KANPUR.
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
NEW DELHI

COURT NO. II

Excise Appeal No. 825 of 2008-SM

(Arising out of Order-in-Appeal No. 22-CE/APPL/KNP/2008 dated 29.1.2008 passed by the Commissioner (Appeals), Customs & Central Excise, Kanpur)

CCE, Kanpur — Appellant

Vs.

M/s S.S. Polyfilms (P) Ltd. — Respondent

Date of Hearing: 4.2.2010

Appearance :

Appeared for Appellant - Shri S.N. Srivastava, SDR
Appeared for Respondent - None

CORAM: HON'BLE MR. D.N. PANDA, JUDICIAL MEMBER

Final Order No....223/2010 SM-(BR).dated............

Per D.N. Panda:

None present for the Respondent. But there is a prayer by application dated 25.1.09 received in the office of the Registry on 1.2.10 praying for decision of the matter on merit. Therefore the matter has been taken up for disposal with the assistance of Revenue.

2. Ld. DR Shri S.N. Srivastava for Revenue submits that proceedings arose consequent upon investigation made on 16.5.98 resulting in shortage of stock of finished goods when physical inventory did not agree with the recorded stock. Such a discrepancy resulted in duty demand of Rs.88,753/- along with penalty of equal amount. Ld. Commissioner (Appeals) in his order states that there was no corroborative evidence of clandestine removal and waived the penalty. But the Adjudicating Authority has made a clear finding that the case was made noticing the elements of Section 11A of Central Excise Act 1944 being present. He has made a thorough enquiry which is coming out from elaborate order passed making an appropriate finding.

3. Heard Revenue and also gone through the materials available on record. There is no dispute that shortage of finished goods has been found by investigation. Ld. Adjudicating authority thoroughly examined pleadings of the assessee. He appreciated that human error in stock taking may not be ruled out. But he found that the case was established due to significant shortage of goods arose which was not out of human error. He also found that the shortage occurred within one month of commencement of production. According to him when huge shortage of goods was found that speaks the intention of the assessee. The assessee did not come forward to plead its innocence by any means or leading evidence. Therefore the authority was compelled to impose penalty of Rs.88,753/-.

However no where the assessee pleaded any concession for penalty under third proviso to Section 11AC of the Central Excise Act 1944.

4. Without looking into the magnitude of the shortage and also intention of the assessee a mechanical order was passed by the ld. Commissioner (Appeals) granting waiver of penalty. But this is not the case where entire judgment of the adjudicating authority can be brushed aside. The adjudicating authority has made his sincere effort to examine various aspects in the adjudication order. His manner of examination clearly indicates his application of mind and he was also equally reasonable to given margin to the human error and shortage. But finding significant shortage, he was helpless. He took shelter of Section 11AC of Central Excise Act, 1944 for imposition of penalty. Therefore imposition of penalty cannot be interfered when innocence of assessee has not come to record proving assessee's bonafide. However, it is necessary to grant an opportunity to the assessee to explain whether it is entitled to any concession in penalty in accordance with third proviso to Section 11AC of Central Excise Act, 1944 and also following the ratio laid down by the Hon'ble High Court of Delhi in the case of **K.P. Pouches (P) Ltd. Vs. Union of India** reported in 2008 (228) ELT 31 (Del.). Hon'ble High Court of Delhi in para-27 of the judgement has explained law relating to concessional penalty which calls for grant of natural justice while imposing penalty under Section 11AC of Central Excise Act, 1944. For convenience of reading, said para is reproduced below:-

"To obviate any similar situation from arising in future, we are of the opinion that in its adjudication order the adjudicating authority under the Act should explicitly state the options available to the Assessee under Section 11AC of the Act. Once the choices are made known to the Assessee and it still does not take advantage of the first proviso to Section 11AC of the Act, it will be entirely at its own peril. Therefore, it would be beneficial, both from the point of view of the Revenue as well as the Assessee, if the options available to the Assessee are mentioned in the adjudication order itself." (emphasis supplied).

5. In view of the judgment of the Hon'ble High Court of Delhi as stated above, it has become necessary to send the matter back to the learned Adjudicating Authority to grant option to the assessee to avail the concession in penalty if its case so deserves. Ld. Authority shall examine whether duty is paid within the prescribed time limit and whether concessional penalty is permissible. Accordingly, he shall pass appropriate order. Consequently the appeal is remanded to learned Adjudicating Authority.

(Dictated & pronounced in open Court)

(D.N. PANDA)
JUDICIAL MEMBER

RM