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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/826 /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 ANOD PHARMA PVT LTD Respondent

I am directed to transmit herewith a certified copy of **Final order No.** 224 / 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 ANOD PHARMA PVT LTD
   E-20,INDUSTRIAL AREA SITE-I, PANKI, KANPUR
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
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. 826 of 2008-SM

(Arising out of Order-in-Appeal No. 26-CE/APPL/KNP/2008 dated 29.1.2008 passed by the Commissioner (Appeals), Customs & Central Excise, Kanpur)

CCE, Kanpur — Appellant

Vs.

M/s Anod Pharma Pvt. Ltd. — Respondent

Date of Hearing: 4.2.2010

Appearance :

Appeared for Appellant - Shri I. Baig, SDR
Appeared for Respondent - Shri Manish Saharan, Advocate

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

Final Order No. 224/2010 SM-(BR)...dated............

Per D.N. Panda:

Ld. DR Shri Baig submits that both the authorities below failed to impose penalty when they appreciated the case was a case of unfound inventory taken on 6.6.06. There was no evidence led by the assessee to prove that shortage of goods alleged was in existence. When lapse of assessee surfaced, it came forward to deposit the duty element on 28.6.06 without any dispute. When the adjudication was made issuing notice that clearly establishes that the case was covered by proviso to Section 11A(1) of the Central Excise Act, 1944 without a case being covered by any unintentional cause to prejudice interest of Revenue. Therefore the authority should not have committed an error to overlook the provisions of law and waived penalty when penalty was warranted in the present case which may be subject to third proviso to Section 11AC of Central Excise Act, 1944.

2. Shri Manish Saharan, ld. Counsel appearing on behalf of respondent vehemently argues that both the authorities below waived penalty for good reason. He relies on the decision of the Tribunal in the case of **CCE Vs. Shree Ganesh Steel Rolling Mills** reported in 2009 (241) ELT 47 and pleads that there shall not be penalty.

3. Heard both sides carefully and have also gone through the decision cited by ld. Counsel. The decision cited by ld. Counsel was on the fact of no evidence of clandestine clearance for which it was held that admission of shortage cannot be straightaway taken into account as admission of clandestine removal. But the present case is a case of detection of shortage of stock found physically. The goods in question appear to be subject to drugs control and governed by Drugs and Cosmetics Act, 1956. Normally, the goods which are under control are to be recorded strictly for the verification of the controlling authority as well as other authorities under different statutes. Once the investigation found that the drug was not available physically, explanation for absence of such drug should have been given to the authority below for examination. But

no explanation has come forward except that the goods were sent back to the packing section of the factory. The assessee has also failed to invite investigating agency to examine the goods in packing section when the assessee proposed to claim bonafide proving its innocence. Several doubts therefore cropped up against the assessee. Revenue has discharged its onus to prove shortage. Pre-ponderance of probability was in favour of Revenue. When the assessee pleaded that the goods were sent to package section, to prove its stand, the assessee should not have failed to discharge its burden of proof coming out with clean hands. Therefore this case clearly falls in the framework of the contravention of the provisions of law when intention of shortage is patent from record by silence of the assessee. When these elements of proviso to Section 11A(1) of Central Excise Act, 1944 are present, it requires to send the matter back to ld. Adjudicating authority to impose appropriate penalty keeping in view the law appearing under third proviso to Section 11AC of Central Excise Act, 1944 and also in accordance with 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.) upon satisfaction of date of payment. With the aforesaid observations, the matter is remanded to ld. Adjudicating authority to carry out the direction as above.

(Dictated & pronounced in open Court)

(D.N. PANDA)
JUDICIAL MEMBER

RM