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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/824 /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 KURELE PACKAGING PVT LTD Respondent

I am directed to transmit herewith a certified copy of **Final order** No. 226 / 2010 –SM[BR] dated 8.2.2010 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 KURELE PACKAGING PVT LTD
   G-23, PANKI INDUSTRIAL AREA, SITE-I,KANPUR.
2. Adv. / Consult SHRI K.K. ANAND ADV.
   A-5, BASMENT LAJPAT NAGAR-III,
   NEW DELHI-24.
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)
16. Office Copy
17. Guard file

Assistant Registrar
(SM Appeal Branch)

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

COURT NO. II

Excise Appeal No. 824 of 2008-SM

(Arising out of Order-in-Appeal No. 21-CE/APPL/KNP/2008 dated 29.1.2008 passed by the Commissioner (Appeals), Customs & Central Excise, Kanpur)

CCE, Kanpur — Appellant

Vs.

M/s Kurele Packaging Pvt. Ltd. — Respondent

Date of Hearing: 4.2.2010

Appearance :

Appeared for Appellant - Shri S.N. Srivastava, SDR
Appeared for Respondent - Shri Hemant Bajaj, Advocate

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

Final Order No...226/2010, SM-(BR).dated............

Per D.N. Panda:

In this case, Revenue is aggrieved for waiver of penalty by ld. Appellate Authority while ld. Adjudicating Authority imposed penalty of Rs.1,83,830/-. Ld. DR Shri S.N. Srivastava submits that consequent upon investigation on 23.12.04 the shortage of finished goods was found. The assessee explained that shortage is relatable to work in progress, which was not actually shown but an established case of clandestine removal. Therefore if the assessee has discharged duty liability, the case did not call for waiver of penalty.

2. Ld. Counsel Shri Hemant Bajaj submits that goods in question was properly been dealt by the assessee and that was explained on the strength of Chartered Accountant's certificate. The department could not find out that goods were clandestinely removed and the element of Section 11A was present. His further argument is that when the penalty was proposed under Rule 25 of Central Excise Rules 2002, the penalty under Section 11AC cannot be imposed.

3. Heard both sides and perused the record.

4. The record demonstrates that the fact of shortage of finished goods remained unexplained. Of course, the channel through which goods were clandestinely moved has not been brought to record. Revenue having explained that work in progress was used to be device by the assessee to explain its case and the assessee failed to demonstrate how the goods were lying in the work in progress and record also did not disclose that the goods were hidden in work in progress, the assessee has a pulpable plea of defence. Only upon detection of the shortage of the goods by Revenue, the assessee preferred to pay the duty to reduce its litigation. When this is the position, penalty is warranted being covered by proviso to Section 11A(1) of Central Excise Act 1944 for the contravention of provision of law. Once there is contravention detected, the case submits itself to penalty. Non-maintenance of proper record to account for the work in progress which was claimed by the assesse to be the

device to explain shortage of finished goods, that itself amounts to breach of law.

5. Revenue agrees that the assessee had discharged the duty liability. Therefore it has become necessary to ascertain whether the assessee shall get any concession on imposition of penalty. The case although throws light that entire duty has been paid before issuance of show-cause notice, mere payment of duty shall not itself grant any immunity from penalty. But the provision relating to concession in penalty is provided by third proviso to Section 11AC of the Central Excise Act, 1944. Both sides having confirmed that duty liability was discharged before issuance of show-cause notice, the assessee is entitled to the concessional penalty granted by third proviso to Section 11AC of the Central Excise Act, 1944. Therefore the penalty totally waived by the ld. Commissioner (Appeals) is reversed reducing the same to 25% of the duty imposed by ld. Adjudicating Authority.

6. With the aforesaid observation, Revenue's appeal is allowed partly.

(Dictated & pronounced in open Court)

(D.N. PANDA)
JUDICIAL MEMBER

RM