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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/3178/2007 – SM[BR] Date 22/09/2010

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 K.K.PRODUCTS Respondent

I am directed to transmit herewith a certified copy of **Final order No.** 994 / 2010-SM[BR] dated 8.9.2010 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 K.K.PRODUCTS
   42/235, BILLOCHPURA, AGRA.
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 Company Law Institute of India Pvt Ltd.,No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
9 M/s. Deeparchie Publications, M-93, Marg. 46, Saket, New Delhi 110017
10 Taxmann Allied Service Pvt Ltd., 59/32, New Rohtak Road, New Delhi - 110005
11 Easy Service Tax Online Dot Com Pvt.Ltd.407A.Iscon Mall.Above Star India Bazar.Satellite Road.Ahmedabad-15
12 LAWCRUX Advisors Pvt Ltd. LAW House.1-8.Sector - 10. Faridabad 121003 (Haryana)
13 TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
14 Office Copy
15 Guard file

Assistant Registrar
(SM Appeal Branch)

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
WEST BLOCK NO.II, R.K. PURAM, NEW DELHI-110066.
Single Member Bench

Excise Appeal No.3178 of 2007-SM

(Arising out of Order-in-Appeal No.331/CE/Appl/KNP/07 dated 14.09.2007 passed by the Commissioner of Central Excise(Appeals), Kanpur)

Date of Hearing/Decision: 08.07.2010

For approval and signature:

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

1	Whether Press Reporters 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 the 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

CCE, Kanpur — Appellant

Vs.

M/s.K.k.Products — Respondent

Present for the Appellant : Shri Anil Khanna, SDR
Present for the Respondent: Shri Saurabh Yadav,, Advocate

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

Final **ORAL ORDER No.** 994/2010 SM(Br)

PER: M.Veeraiyan

This is an appeal filed by the department against the Order-in-Appeal No.331/CE/Appl/KNP/07 dated 14.09.2007 of the Commissioner (Appeals).

2. Heard both sides.

3. The relevant facts in brief are that the premises of the respondents was visited by the officers of Central Excise on 12.11.2005. While they have declared only two numbers of the machines of gutka pouch making machines installed in pursuance of the Trade Notice issued by the Commissioner, it was noticed that the respondents installed four such machines of identical capacity. Shri Rajkumar, proprietor of the firm who was present at the factory premises gave statement stating that other two machines have also been used in the manufacture and the goods manufactured using undeclared machines have not been entered in RG-1 register, the goods were cleared without issue of invoices/bills and without payment of central excise duty. The statement was not retracted. It was followed by payment of Rs.4,25,000/- in four different instalments, first instalment being on 14.11.2005 and the last one being on 2.1.2006. The original authority, in pursuance of the show cause notice dated 10.10.2006, confirmed demand of Rs.4,99,851/- and imposed equal amount of penalty under Section 11AC read with Rule 25 of Central Excise Rules, 2002. On appeal by the party, the Commissioner (Appeals) has set aside the order-in-original of the original authority on the ground that there was no corroborative evidence relating to the manufacture and clearance of the goods using the undeclared machines.

4. Learned SDR submits that the existence of the two extra machines is not in dispute. The proprietor of the firm has clearly admitted the use of the said machines for unaccounted production and clandestine removal of the goods. The respondents have also paid the duty on four different occasions amounting to Rs.4,25,000/- Inasmuch as the unaccounted production and clandestinely removal

was admitted by the proprietor of the firm himself and further investigation was not carried out. He is also relying upon the decision in the case of CCE, Ahmedabad vs. Gopal Textile Mills Pvt.Ltd. reported in 2007 (215) ELT 558 to submit that the admitted fact need not be proved. He further submits that the statement has not been retracted by the proprietor of the firm.

5. Learned Advocate for the respondents submits that the entire duty has been confirmed and penalty imposed merely based on the statement of the proprietor. The statement was extracted under pressure. The payments made were not voluntary. In the absence of any corroborative evidence, the order of the Commissioner (Appeals) should be up held. The investigating officers have failed to do any investigation on excess procurement of inputs, use of electricity, use of labour force, transportation of raw materials and transportation of the finished goods, destination of the unaccounted goods and remittances of the sale proceeds. Further, he submits that even when there was no investigation, there was considerable delay in issue of show cause notice and it was issued only on 10.10.2006. As an alternate plea, the learned Advocate submits that the original authority did not give an option to pay reduced penalty in terms of the first proviso to Section 11AC and the same may be offered in view of the decision of the Hon'ble Delhi High Court of Delhi in the case of K.P.Pouches Pvt.Ltd. reported in 2008 (228) ELT 761.

6. I have carefully considered the submissions from both sides and perused the records. The existence of four machines as against two undeclared machines is not in dispute. The proprietor himself had clearly admitted to the manufacture using two undeclared machines ,and the goods arising out of the said machines were not

entered in the RG-1 register and cleared without raising invoices and bills. It is not the case of the respondents that they have revealed the name of the transporter or the name of the buyers of the goods to enable further investigation. The statement dated 12.11.2005 has not been retracted. On the other hand, the same has been acted upon and the duty has been paid in four instalments spread over a period of 3 months. Merely because a belated submission has been made in reply to the show cause notice that the statement was extracted and payments were not voluntary, un-retracted statement dated 12.11.2005 which has been acted upon cannot be doubted. Having chosen to admit evasion of duty and pay duty involved, the respondent cannot be permitted to say that no further investigation was undertaken by the investigating officers.

8. Under these circumstances, the finding of the Commissioner (Appeals) that there was no corroborative evidence of clandestine clearance and Consequently ~~loose quantity~~ setting aside the order of the adjudication is not justified. Therefore the order of the Commissioner (Appeals) requires to be set aside and the order of the original authority deserves to be restored.

9. However, the submission of the learned Advocate for granting option to pay concessional penalty in terms of the first proviso to Section 11AC deserved to be accepted.

10. In view of the above the appeal is disposed of as follows:

(a) The order of the original authority confirming the duty and imposing penalty is restored. The respondents have to pay balance of duty and interest within thirty days from today.

(b) The respondents are given an option to pay 25% of the penalty amounting to Rs.1,24,962.75 within thirty days from today.

(c) if the respondents do not pay the above amount within stipulated time, the penalty shall be Rs.4,99,851/-.

(M.VEERAIYAN)
MEMBER (TECHNICAL)

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