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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066
EXCISE APPEAL BRANCH

Appeal No. E/294 /2006-296 /2006 - EX[DB]   Date 25/01/2010

Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
M/S V.S.EXIM PVT.LTD.
A-20,INDUSTRIAL AREA SIKANDRABAD U.P.

M/S V.S.EXIM PVT.LTD.   Appellant
Vs
C.C.E. NOIDA   Respondent

I am directed to transmit herewith a certified copy of **Final order No. 24-26/ 2010 EX[DB]** dated 18-1-10 passed by the Tribunal under Section 35-C(1)of Central Excises Act, 1944

Assistant Registrar
(Excise Appeal Branch)

Copy to :
1. Respondent
   C.C.E. NOIDA
   C-56/42, SECTOR-62, NOIDA-201307
2. Adv. / Consult
   MR.M.P. SINGH
   43,SAMAJ KALYAN APARTMENT F-BLOCK,VIKASPURI,N.DELHI
3. C.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
(Excise Appeal Branch)

18. SHRI SAMEER GUPTA M/S V.S.EXIM PVT.LTD.
    A-20 INDUSTRIAL AREA SIKANDRABAD U.P.

19. SHRI VINAY GUPTA M/S V.S. EXIM PVT.LTD.
    A-20,INDUSTRIAL AREA SIKANDRABAD U.P.

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

Excise Appeal No.E/294 to 296/2006

[Arising out of Order-in-Appeal No.110-113-CE/APPL/NOIDA/05 dated 28.11.2005 passed by the Commissioner (Appeals), Customs & Central Excise, Meerut-II (Noida)]

Date of Hearing:05.01.2010
Date of decision: 05.01.2010

M/s. V.S. Exim Pvt. Ltd.
Shri Vinay Gupta, Director
Shri Sameer Gupta, Director ...Appellants

Vs.

CCE, NOIDA ... Respondent

Present for the Appellant :ShrI.M.P. Singh, Advocate
Present for the Respondent:Shri.Vijay Kumar, SDR

Coram: Hon'ble Mr.D.N.Panda, Judicial Member
Hon'ble Mr. Rakesh Kumar, Technical Member

FINAL **ORDER NO.** 24-26/2010-EX **DATED:05.01.2010**

PER: D.N.PANDA

Ld. Counsel has challenged the adjudication order on following three counts.

(1) That the shortage of certain goods detected in the course of investigation on 27.6.03 and 28.6.03 is very minor and insignificant for which no duty should be levied.

(2) That the Truck found outside the factory carrying goods was meant for getting its weighment done outside and that not being a case of clandestine removal, imposition of redemption fine is unwarranted.

(3) That the levy of excise duty of Rs.1,31,557/- on the basis of breakdown report is uncalled for.

2. Elaborating his argument Mr. Singh, ld. Counsel submits that the insignificant difference of the weighment in the course of investigation resulting minor shortage does not call for imposition of duty of Rs.8,247/-. He submits that the duty so imposed was without properly evaluating evidence on record.

3. So far as the goods found in the Truck outside the factory is concerned, he submits that the goods were carried for weighment in Dharamkanta before dispatch of the same. He draws attention to the statement dated 26.3.2003 recorded from Shri.Lokesh, Driver of the vehicle (Truck No.UP 14 5865), and points out that he was given a slip by the factory for weighment of the goods and such slip was handed over to the Central Excise Authority on interception. The Driver categorically stated that he was asked to get weighment of goods on dharamkanta and the employee of the company who was looking after excise work told him to meet him at weighing place. This clearly establishes that the goods were meant for weighment in Dharamkanta and comes out from the preliminary statement itself. The driver has reflected his mind speaking truth as above. Therefore, there is no contrary evidence brought by revenue to dispel the statement of the driver proving otherwise. Accordingly, redemption fine was unwarranted when the goods were claimed to be of the assessee itself. Those goods were recorded in excise books and duty shall suffers in the course of removal of the goods.

4. So far as the levy of duty of Rs.11,31,557/- is concerned, he submits that this levy arose on the examination of breakdown report found by the investigation team. The report relates to the period 24.3.2002 to 12.11.2002 depicting the date on which there was a breakdown of the mill. The breakdown report is also based on each days breakdown statement prepared by the labourers. Sample copies of the breakdown report have been placed by him at page 3 to 7 of the copies of document filed for hearing of the appeal. He submits that the statement at page 66 of the appeal folder forming part of the show cause notice indicates the quantities worked out by the Revenue on the basis of breakdown report. According to Revenue, there was higher quantity of goods manufactured while lower quantity of goods has been recorded in the RG-I Register. The difference between the two gave rise to demand of Rs.11,31,557/-. He demonstrates from the reverse of page 7 of the breakdown report relating to 26.3.2002 to show comparison with the goods recorded in RG-I Register as appearing at page 80 of the appeal folder. He submits that according to the breakdown report there was work in progress of 14.098 MT of goods in the factory to reach finality of manufacturer. While that was the factual position, there was recording of 17.010MT quantity of goods in the RGI Register. The finished pipe itself was 15.450 MT as recorded in RG I Register of 26.3.02. Once this sample document is evaluated nothing proves against the assessee since the facts recorded on the reverse of the breakdown report was not the finished goods but work in progress and when work in progress

reached finality, that was recorded in RG-I register. He further submits that the breakdown report was prepared by labourers and that cannot be the basis for the allegation. He draws our attention to page 36 of the paper book filed and reads question No.5, appearing in the statement dated 13.08.2003 recorded from Shri J.S.Singh who was the General Manager. According to the answer given to question No.5, the General Manager has stated that the facts stated on the breakdown report was processed production of the concerned shift. He has never stated that the quantity was of finished goods. On none of the days that is 27.06.03, 13.8.03, 26.8.03 and 19.11.03 anything has been spelt by the General Manager to show that the facts recorded on the reverse of the breakdown statement giving rise to the facts and figures at page 66 of the appeal folder, which formed part of show cause notice was the finished goods produced. The General Manager joined on 15.05.03 with the appellant. He was not aware of the facts and figures prior to 24.03.02. But he has helped Revenue to work out the quantity of finished goods that may arise through the method of conversion of the various goods using different units of calculation for arriving at the quantity of production. Therefore, the breakdown report shall not be the basis to make allegation against appellant in absence of any cogent evidence to show that there was suppression of any manufacture done by the appellants. Therefore, the duty levied is not sustainable.

5. So far as levy of the penalties on the appellant and other individuals are concerned, he submits that there is nothing

malafide coming out from the materials borne by record for which no penalty should be levied.

6. Ld. DR Shri Vijay Kumar vehemently opposes the submissions of the ld. Counsel on all the three counts. He submits that the shortage although claimed to be insignificant by the assessee, that was shortage on record. Therefore, the assessee is liable to duty and penalty on that count.

7. So far as the goods carried by truck is concerned, the goods were removed without following the procedure of removal for weighment outside. Therefore, the plea taken that the goods were meant for weighment outside is untenable and that can be acceptable.

8. So far as the levy of duty of Rs.11,31,557/- made on the basis of breakdown report is concerned, he relies on the findings of the ld. Authorities below. He submits that when the assessee itself has worked out the discrepancies through various statements recorded and also paid the duty, the appellants should suffer the duty liability as well as penalty. The redemption fine imposed was also proper when the goods were removed without following the procedure laid down. Penalties imposed on individual were properly done without any defence led by them proving their bonafide.

9. Heard both sides extensively and perused the records. So far as the shortage that was found giving rise to the duty demand of Rs.8,247/- is concerned, there is no evidence

placed by the appellant to prove its stand that the shortage was not resulted out of control of the appellant. Once that is not proved, the demand shall sustain and penalties shall also follow, we confirm the adjudication order on this count.

10. So far as the redemption fine of Rs.50,000/- in respect of the goods carried by Truck is concerned, the oral evidence of driver dated 26.3.2003 clearly indicates that the goods were meant for weighing outside in dharamkanta. Driver has disclosed the name of Shri B.M.Bika who had asked the driver to meet him at weighing place. There is no evidence recorded from Mr.Bika to discard the pleading of the appellant as to the weighment of the goods outside. There is also no evidence on record that whether these are surplus goods over and above the quantity shown in the record. In absence of any collateral evidence to discard the truthful statement of the driver, there cannot be any allegation of clandestine removal of the goods found outside the factory. We tried to found out whether preponderance of probabilities shall be in favour of Revenue. Only because the procedure was not followed to remove the goods from factory for weighment outside the appellant, that may not make the appellant liable to pay duty. Accordingly, we consider it proper to reduce the redemption fine in the facts and circumstances of the case to Rs.20,000/- instead of Rs.50,000/- imposed.

11. So far as the raising of duty demand of Rs.11,31,557/- on the allegation of suppression of manufacture is concerned we are able to notice that the figures on the back side of page

were finished goods. Those

7 which is a sample breakdown report of 26.3.2002 merely exhibit dumb figures without lending credential to dispute manufactured quantity. There is nothing on record available to see whether any of the labourers were examined to find veracity of the contents on the backside of the breakdown report. Even the General Manager's statement clearly shows that the facts recorded on the breakdown report were the processed goods. Ld. Counsel having demonstrated from page 80 of the appeal folder that the manufactured goods on 26.3.2002 was much more than the figure of 14.098 MT appearing on the backside of the page 7 which is a breakdown statement, that does not support the case of revenue. Once this demonstration is made, in absence of any cogent evidence to notice that there were contributory factors for suppression of manufacture, the appellant should get benefit of doubt without any preponderance of probability in favour of revenue. There is nothing on record to suggest that the statement of Shri J.S. Singh was erroneous. The breakdown statement itself did not show the quantum of finished goods manufactured on the respective day. It may be probable to state that various unfinished stage involve in manufacture of goods. Such unfinished stage goods were converted into MTs at page 66 of the appeal folder to form part of the show-cause-notice, depicting the shortage of production. There is no material brought on record to show that the appellant has made any surplus production during the breakdown period either suppressing its purchase of raw-material or suppressing power consumed or clearing the goods clandestinely. When

no such evidence come forward to prove contumacious conduct of the appellant, the appellant should not suffer.

12. Ld. DR's submission that the duty has been paid, shall be of no support to the case of revenue. When the facts and figures came to light and investigation wasmade on 27.7.2003 followed by further investigation on the next day, no efforts were made by investigation to compare the production of the past or the future when show cause notice was issued on 31.3.2004. When the breakdown was claimed by the assessee, the date on which the repair was made and the factory resumed production was also not examined. In absence of any probability to speak in favour of the revenue, we consider that there is a force on the part of the appellant to claim its bonafide on the basis of the breakdown report. Accordingly, levy of duty of Rs.11,31,557/- does not sustain. We order accordingly. Once this duty demand does not sustain, there shall be no penalty.

13. So far as individual penalties are concerned, there is nothing on record to show malafide of the individuals. In absence of that, there shall be no levy of penalty on both the individuals.

14. In the result, duty demand of Rs.8,247/- is confirmed with penalty thereon, redemption fine is reduced to Rs.20,000/- and duty demand of Rs.11,31,557/- is annulled, waiving penalty of equal amount imposed and the individual appellants get total relief. Appeal is allowed to this extent.

[Dictated & Pronounced in the open Court].

(D.N.PANDA)
JUDICIAL MEMBER

(RAKESH KUMAR)
TECHNICAL MEMBER

Anita