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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/2927/2009-2928/2009 - EX[DB] WITH E/S/3026-3027/2009-EX   Date 29/09/2010

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

To :
M/S POSITIVE PLASTICS PVT LTD
D-213&214, SECTOR-10, NOIDA

M/S POSITIVE PLASTICS PVT LTD   Appellant
Vs
C.C.E. NOIDA   STAY ORDER NO. 683-84/10-EX   Respondent

I am directed to transmit herewith a certified copy of **Final order No.** 661-662/ **2010 EX[DB]** dated 23-8-10 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 SH. VISHWANATH SHUKLA, ADV., C/O
   MR.VAISH ASSOCIATES,ADVOCATES
   FLATS 5,6,7,10 HAILEY ROAD,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 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
16. HON'BLE PRESIDENT.
17. RAJNEESH KUMAR RAGHUYAL,DIRECTOR
M/S POSITIVE PLASTICS PVT LTD, D-213&214, SECTOR 10, NOIDA.

Assistant Registrar
(Excise Appeal Branch)

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.
Principal Bench, New Delhi

COURT NO. I

DATE OF HEARING : 23/08/2010.
DATE OF DECISION : 23/08/2010.

Excise Stay Application No. 3026 of 2009 in appeal No. 2927 of 2009

M/s Positive Plastics Pvt. Ltd. — Appellants

Versus

CCE, Noida — Respondent

Excise Stay Application No. 3027 of 2009 in appeal No. 2928 of 2009

Shri Rajneesh Kumar Raghuyal]
Director of M/s Positive Plastics Pvt. Ltd.] — Appellants

Versus

CCE, Noida — Respondent

Appearance

Shri Vishwanath Shukla, Advocate – for the Appellants.

Shri Nitin Anand, Authorized Representative (DR) – for the Respondent.

CORAM : **Hon'ble Shri Justice R.M.S. Khandeparkar, President**
Hon'ble Shri Rakesh Kumar, Member (Technical)

STAY Order No. 683-684/10 Dated : ______________

Per. Shri Justice R.M.S. Khandeparkar :-

Heard the learned advocate for the appellants and DR for the respondent. As we propose to dispose of the appeals we allow the applications without insisting for any deposit in the matter, while directing the Registry to place the appeals for final disposal forthwith. The applications accordingly stand disposed of.

(Justice R.M.S. Khandeparkar)
President

(Rakesh Kumar)
Member (Technical)

PK

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.
Principal Bench, New Delhi

COURT NO. I

DATE OF HEARING : 23/08/2010.
DATE OF DECISION : 23/08/2010.

Excise Appeal No. 2927 of 2009

M/s Positive Plastics Pvt. Ltd. — Appellants

Versus

CCE, Noida — Respondent

Excise Appeal No. 2928 of 2009

Shri Rajneesh Kumar Raghuyal]
Director of M/s Positive Plastics Pvt. Ltd.] — Appellants

Versus

CCE, Noida — Respondent

[Arising out of the Order-in-Appeal No. 219-220/CE/APPL/NOIDA/2009 dated 31/07/2009 passed by The Commissioner (Appeals), Customs & Central Excise, Noida.]

For Approval and signature :

Hon'ble Shri Justice R.M.S. Khandeparkar, President
Hon'ble Shri Rakesh Kumar, 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 would be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	: No
3.	Whether their Lordships wish to see the fair copy of the order?	: Seen
4.	Whether order is to be circulated to the Department Authorities?	: Y

Appearance

Shri Vishwanath Shukla, Advocate – for the Appellants.

Shri Nitin Anand, Authorized Representative (DR) – for the Respondent.

CORAM : **Hon'ble Shri Justice R.M.S. Khandeparkar, President**
Hon'ble Shri Rakesh Kumar, Member (Technical)

Order No. ______________ Dated : 25/8/10
Final order No 661-662/10-EX

Per. Shri Justice R.M.S. Khandeparkar :-

Heard the learned advocate for the appellants and DR for the respondent. These appeals are being heard in terms of order passed today in stay applications Nos. 3026-3027 of 2009.

2. The appellants challenge the order passed by the Commissioner (Appeals), Noida on 31st July 2009. By the impugned order, the Commissioner (Appeals) has dismissed the appeals filed by the appellants against the order passed by the Adjudicating Authority. The Joint Commissioner, Noida vide his order dated 29th September 2008 had disallowed the Cenvat credit amounting to Rs. 33,36,625/- and had imposed penalty of equal amount against the appellants company as well as its Director Shri Rajneesh Kumar Raghuyal as well as against the Director of M/s Kashish Products Impex (P) Ltd., Khasra.

3. The appellants are engaged in manufacture of PVC/Resin sleeves, protectors, cover connectors, dust boots, battery terminal covers etc. falling under chapter 85 of the Central Excise Tariff Act 1985. In the course of the investigation, it was revealed that the appellants had wrongly availed Cenvat credit on the basis of fictitious invoices issued by M/s Kashish Products Impex (P) Ltd. during the period July 2002 to July 2005 amounting to

Rs. 33,36,625/- and, therefore, a show cause notice dated 30th July 2007 came to be issued. The proceedings were contested by the appellants. The Adjudicating Authority after hearing the parties passed the said order. The appeals carried against the same were dismissed by the impugned order and hence the present appeals.

4. Though the impugned order is sought to be challenged on various grounds, it is not necessary to refer to all those grounds and suffice to refer to only one ground namely failure on the part of the lower Appellate Authority to consider the matter as was required to be considered by the first Appellate Authority.

5. Plain reading of the impugned order discloses that after noting down the grounds of challenge to the order passed by the Adjudicating Authority, the entire proceedings were sought to be disposed of by two paragraphs which read thus :-

> "7.3 I find that the adjudicating authority in the impugned order confirmed the demand taking into consideration the following facts –
>
> - Statements dated 15.06.06 and 07.09.06 of Sh. Rajneesh Kumar Raghuyal (appellant -2) wherein he stated that he cannot comment upon the statement of Sh. Naresh Guleria; he cannot state whether or not there was any manufacturing activity on the days except when he visited the factory premises of M/s Kashish Products, Delhi; he cannot comment upon the statements of driver/owner of the transport vehicles whose numbers were given on the invoices; he could not produce the gate entry register evidencing receipt of goods under the invoices of M/s

Kashish Products, Delhi. Sh. Rajneesh Raghuyal agreed that he would deposit the duty amount in question by 11.09.06.

- Statements of the drivers/owners of the transport vehicles who denied having transported any goods in their vehicles from M/s Kashish Products, Delhi to the factory premises of the appellants.
- Statements of Sh. Naresh Guleria, Director of M/s Kashish Products Impex P. Ltd., Delhi tendered under Section 14 of the Central Excise Act, 1944 wherein it has been categorically admitted that only invoices were issued without dispatch of any goods.'

7.4 I find that while the appellants put forth several points of arguments but have not challenged any of the above said facts on which the impugned order has been rested. There is nothing on record suggesting retraction of Sh. Guleria from what he has tendered in the statements given under Section 14 of the Central Excise Act, 1944 recorded by the officers of the Central Excise Commissionerate, Delhi-I and appellant no. 2 also gave statement at the relevant time but was unable to prove the receipt of inputs under the said invoices. The deposition made by Sh. Guleria in his statement is binding, this view is in conformity with the judgment of the Hon'ble Supreme Court in the case of Surjeet Singh Chhabra vs. U.O.I. 1997 (89) E.L.T. 646 (S.C.).Relying on the said judgment the Tribunal too in its decision in the case of CCE, Mumbai-V vs. Nippon Zip Industry Pvt. Ltd. 2009 (236) E.L.T. 554 (Tri. Mumbai) and referring to several other judgments on the evidentiary value of a confessional statement, clearly held that such a statement can be relied upon for establishing an offence unless evidence shows that it was obtained under duress, threat, coercion. Thus, once the statement admits the offence there is no requirement of any corroborative evidence to substantiate the findings contained in the impugned order."

6. As far as first para from the impugned order quoted above is concerned, it merely relates to some of the grounds on which the adjudicating authority had decided the matter. ~~He~~ It does not refer to any of the reasons on the part of the first Appellate Authority for decision by the first Appellate Authority in the matter.

7. As regards, the second para from the impugned order quoted above, it refers to statement of Shri Guleria to hold that the findings arrived at by the lower authority does do not require interference. Apparently said para does not even relate to the contents of statement of Shri Guleria. It merely refers to the fact that the statement of Shri Guleria was recorded under Section 14 and there was nothing on record to suggest that the statement was retracted. The para further states that such statement is binding in terms of the decisions of the Hon'ble Supreme Court and of the Tribunal and that, therefore, there is no requirement of any corroborative evidence in relation to the contents of the statement.

8. Apparently it discloses total non-application of mind by the first Appellate Authority to the matter in issue.

9. The allegations against the appellants are of serious nature as the same refer to availment of Cenvat credit on the basis of fictitious invoices issued by a third party. In such circumstances,

it was necessary for the Commissioner (Appeals), being the first Appellate Authority, and therefore being a court of facts, to analyse the materials on record in proper prospective independently of the analysis of the materials by the original authority, and thereafter to arrive at appropriate findings on the issues involved and which were sought to be raised by the appellants before the lower Appellate Authority. The impugned order apparently discloses that the appellants had put-forward several points or arguments and Commissioner (Appeals) did not consider any of those points and proceeded to decide the matter merely on the basis of the statement of Shri Guleria. The observation that the records do not suggest about retraction of the said statement does not appear to be the whole truth. It is sought to be contended on behalf of the appellants that the said statement was retracted while giving answer to the questionnaire issued to the supplier. Undoubtedly, the same was done about 5 months after recording of statement. In that regard it was necessary for the Commissioner (Appeals) to consider the said argument advanced on behalf of the appellants and to ascertain the effect of the alleged retraction after 5 months before relying upon the statement of Shri Guleria.

10. Merely recording that the lower authority has decided the matter on particular points does not amount to application of mind by the Appellate Authority. Having said that the lower authority has decided the matter on the basis of certain materials, it was necessary for the lower Appellate Authority to

ascertain by analysing those materials as to whether the findings arrived at by the lower authority were borne out from the records or not. There is no such exercise made by the lower Appellate Authority.

11. It is also to be noted that the order passed by the Commissioner (Appeals) is subject to further appeal before the Tribunal. It is, therefore, necessary for the Commissioner (Appeals) to disclose in his order the points which arise for consideration and decide the matter with proper reasoning in support of the findings which such authority may arrive at. The impugned order does not disclose any such thing.

12. In the result, the impugned order cannot be sustained and is liable to be set aside and the matter is remanded to the Commissioner (Appeals) and after hearing the parties, to pass an appropriate order on consideration of the entire materials and after arriving at appropriate findings based on such analysis.

13. Appeals are accordingly allowed and the matters are remanded to the Commissioner (Appeals), as stated above.

(Justice R.M.S. Khandeparkar)
President

(Rakesh Kumar)
Member (Technical)

PK