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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/1095/2005-1096/2005 - EX[DB] Date 16/07/2010

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

To :
SIR SAI ENTERPRISES
D-21-22,SWARN PARK, MUNDKA, NEW DELHI
110041

SIR SAI ENTERPRISES Appellant
Vs
C.C.E. DELHI I Respondent

I am directed to transmit herewith a certified copy of **Final order No.** 453-454 **2010 EX[DB]** dated 01-7-10 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. DELHI I
   C.R. BUILDING, I.P. ESTATE, NEW DELHI 110002
2. Adv. / Consult
   MR.A.K.MISHRA, CONSULTANT,
   B-25, LAJPAT NAGAR-III,
   N. DELHI-24
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. RAJ KUMAR,PARTNER
    D-21-22, SWARN PARK, MUNDKA, N. DELHI-41

Assistant Registrar
(Excise Appeal Branch)

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block 2, R.K.Puram,New Delhi-110066
Principal Bench, New Delhi.

E/1095-96/05

(Arising out of Order-in-Appeal No.168-169-CE/DLH/2004 dated 20.12.2004 passed by the Commissioner(Appeals), New Delhi)

For approval and signature:

Hon'ble Mr. Justice R.M.S.Khandeparkar, President
Hon'ble Mr. 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: :	Yes

M/s. Sri Sai Enterprises
Sh. Rajkumar, Partner — Appellants

Vs

CCE, New Delhi — Respondent

Appearance
Shri A.K.Mishra, Adv. For Appellants

Shri Nitin Anand, DR for Respondent

Coram: Hon'ble Mr. JUSTICE R.M.S.KHANDEPARKAR, PRESIDENT
Hon'ble Mr. RAKESH KUMAR, MEMBER (TECHNICAL)

Date of decision: 1.7.2010
Final Oral Order No. 453-454/10-Ex

Per Justice R.M.S.Khandeparkar:

Since common questions of law and facts arise in both the appeals, they were heard together and are being disposed by this common order.

2. We have heard Sh. A.K.Mishra, learned Advocate for the appellants and Sh. Nitin Anand, learned DR for the respondent.

3. The present appeals arise from the order dated 20.12.2004 passed by the Commissioner(Appeals), Delhi. By the impugned order, the appeals filed by the appellants against the order of the original authority have been dismissed. The Additional Commissioner, Delhi by his order dated 5.3.2004 had confirmed the duty amount of Rs.17,88,262/- against the appellants in relation to the goods which were cleared without payment of duty during the period 1999 to 2001 alongwith interest and imposed the equal amount of penalty. An amount of Rs.2,50,000/- voluntarily paid by the appellants was ordered to be adjusted and appropriated towards the duty amount payable under the order. The partner of the appellants has also been subjected to imposition of penalty of Rs.10,000/-.

4. The appellants M/s. Sri Sai Enterprises are engaged in the manufacture of Man made fabrics laminated with PU Foam classifiable under Tariff Heading 5903.00 of the first schedule to the Central Excise Tariff Act,1985. The appellants were availing Modvat credit on one of the raw-materials i.e. PU Foam used in the manufacture of the final product.

5. On the basis of the intelligence report, the premises of the appellants were searched on 1.2.2001 in the presence of two witnesses and Sh. Raj Kumar, Partner of the appellants' firm. During the course of search, physical stock checking of the finished product as well as raw-material was undertaken and the same disclosed 1230 m.t. of Man made laminated fabric in excess of the quantity recorded in the RG.I

register in respect thereof and 117.2 kgs. of PU foam was found short of the recorded balance in RG-23 Part I register. Accordingly, show cause notice came to be issued on 23.7.01. Meanwhile a statement was also recorded of Sh. Raj Kumar, Partner of the firm on 1.2.01.

6. The proceeding was contested by the appellants without success as the adjudicating authority under order dated 5.3.04 demanded duty and imposed the penalty as stated above. The appeal carried against the same did not yield fruitful results to the appellants. Hence the present appeals.

7. Only issue which arose for consideration in the matter before the lower authorities as well as, which arises for consideration in these appeals, is whether the appellants had suppressed production of certain quantity of the final product manufactured by the appellants in order to remove the same clandestinely by showing excess consumption of PU Foam.

8. Both the authorities after considering the entire materials on record including the statement of Sh. Raj Kumar and the production report on the basis of test conducted by the Department and by taking into account that one Foam Roll weighing 20 kg. with thickness of 1.8mm and length of 415 meters have arrived at concurrent findings about the clandestine manufacture of the final product and clandestine clearance thereof and the said production being suppressed from the Department.

9. Indeed the statement of Sh. Raj Kumar, the partner of the appellants' firm recorded on 15.2.01 which was carried out in the premises of the appellants had clearly stated thus –

> "I further stated that sometimes raw material PU Foam of excess thickness is received instead of 1.8mm as ordered whereas he sends after converting it into 1.8mm thickness due to which length of Foam Roll is effected and length is reduced. On being asked I stated that there is no mention of thickness and length of sheet on the bills received from M/s. Sheela Foam, therefore, I could not produce any document/evidence in relation to my aforesaid statement".

"Regarding consumption of PU Foam in excess of the actual I have to state that at the demand of the buyers we have to sell some goods without bill. We show the Foam used in such clearances in this manner. I do not keep any details of such sales. On being asked I state that this type of buyer's demand mostly of 4 mm variety and I deliver the goods according to their convenience. Further I state that due to fire in August,1999 in my factory PU Foam and Fabric were gutted, the information of which was not given by me to any Department. Apart from this in April – September,2000, I have sold approximately 3 tons of PU Foam to Shri Kasturi Lal whose address is not known to me at present".

10. In fact the statement of Sh. Raj Kumar was also recorded on the day of search conducted in the premises i.e. on 1.2.2001, In the said statement he had clearly stated that -

""Thereafter they(officers) conducted search of the factory and asked to count final product and raw material. I have taken them to factory premises and help them to count the goods. They opened one Foam Roll on which production report SR # 44 dated 24.1.2001 was affixed, and got the same weighed and found the weight 20 kg. Thickness of this was 1.8mm and length was 415 meters as measured on the machine".

"The Officers counted finished products and raw material and found 1230 meter of final product in excess. I cannot say anything about this mistake and explain the same after verification. Similarly 117.2 kgs. of foam was found short on which Modvat credit of Rs.3,657/- has been reversed in RG-23A Part-11 voluntarily".

11. The show cause notice was issued to the appellants on 3.7.2003. Reply to the show cause notice was submitted by the appellants on 17.12.2003. It is pertinent to note that even in reply to the show cause notice, the appellants did not dispute the correctness of the statement made on 1.2.2001 and/or 15.2.2001. Undoubtedly in the case of allegation of clandestine manufacture and removal of the goods by an assessee the initial burden lies upon the Department to prove the same. But in a case where the assessee himself admits certain basic facts which lead to clear conclusion about clandestine manufacture and clandestine removal of the goods from the factory, onus obviously shifted upon the assessee to disprove the facts established by the Department on the basis of admissions made by the assessee.

12. In the case in hand, the appellants had clearly admitted on 15.2.01 that PU Foam in excess quantity was being received by the appellants in their factory, that they were manufacturing the final product which was not limited to the quantity of final product as disclosed in the statutory records, that some of the buyers required such final product without being covered by any invoice or bill and that accordingly such product was being supplied to those buyers by the appellants after being manufactured in the factory of the appellants. Further, the appellants were not maintaining any details of such clearances. There was clear admission of these facts on 15.2.2001 and it was nowhere the case of the appellants that the statement was incorrectly recorded by the Department. In these circumstances, apart from the said admission, the Department having undertaken the experiment in relation to 20kg. Roll to ascertain the final product which could be manufactured by utilizing the said raw-material and on the basis of it having ascertained the quantity of clandestine removal of the goods, which is again supported by established formula in that regard which has been referred to in the order passed by the original authority, we find no fault in the findings arrived at by the authorities below. In this regard, the appellants have clearly failed to disapprove the material brought on record by the Department, including clear admission on the part of the appellants on the relevant issue in the matter. Being so, we do not find any case for interference in the matter and hence the appeals are dismissed.

(Justice R.M.S.Khandeparkar)
President

(Rakesh Kumar)
Member Technical

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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

Date : 10/08/2011

MISC Order No. MO/438/2011- EX[DB]

Application E/ROM/22/2011 - EX In

Appeal No. E/1095 & 1096/2005 - EX[DB]

1. Appellant
   SIR SAI ENTERPRISES
   D-21-22,SWARN PARK, MUNDKA, NEW DELHI
   110041
   16. SH. RAJ KUMAR, PARTNER
2. Respondent
   C.C.E. DELHI I
   C.R. BUILDING, I.P. ESTATE, NEW DELHI 110002
3. Adv / Consult : SH. R. KRISHNAN, ADV., 297-E, POCKET-II, PHASE-I, MAYUR VIHAR, DELHI-91
4. C.D.R
5. Bar Association, CESTAT, New Delhi.
6. Director Publications, Customs, Excise. I.P. Estate, New Delhi
7. M/s Centax Publications Pvt Ltd., 1512-B, Bhishm Pitamah Marg, Opp. ICICI Bank of Defence Colony, New Delhi - 110003
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13. Office Copy
14. Guard File
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Assistant Registrar
(Excise Appeal Branch)

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No.2, R. K. Puram, New Delhi.
Court No. 1

Date of hearing/decision: 29.07.2011

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 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.

Excise ROM Application No. 22 of 2011 in
Excise Appeal Nos. 1095 - 1096 of 2005

M/s Sri Sai Enterprises — Appellants
Raj Kumar, Partner

Vs.

CCE, Delhi-I — Respondent

Appearance:

Rep. by Sh. R. Krishnan, Advocate for the appellants.

Rep. by Sh. R. K. Verma, DR for the respondent.

Coram: Hon'ble Sh. Justice R.M.S. Khandeparkar, President
Hon'ble Sh. Rakesh Kumar, Member (Technical)

Misc. ORAL ORDER NO. 438/2011-EX

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

Heard the learned Advocate for the applicants and the DR for the respondent.

2. By the present application the appellants is praying for permission to exercise the option to pay 25% of the duty as penalty alongwith interest as calculated and communicated by the respondent to the appellants within 30 days of the passing of the order on the present application.

3. It is the contention of the applicants that the authorities while disposing of the matter did not specifically made offer to permit the appellants to pay 25% of the penalty in terms of the first proviso to Section 11AC. It is their further case that this aspect was ignored by the Tribunal while deciding the matter on 01.07.2011 and hence the present application.

4. Learned Advocate for the appellants placing reliance in the decision in the matter of **Exotic Associates** vs. **CCE** reported in 2010 (252) ELT 49 (Guj.), **K.P. Pouches (P) Ltd.** vs. **Union of India** reported in 2008 228) ELT 31 (Del.), **CCE&C, Surat-II** vs. **Gopal Fibres Pvt. Ltd.** reported in 2010 (256) ELT 10 (Guj.), **CCE&C, Surat-I** vs. **Palav Synthetics** reported in 2010 (258) ELT 59 (Guj.) & **CCE, Rohtak** vs. **J.R. Fabrics (P) Ltd.** reported in 2009 (238) ELT 209 (P&H) submitted that the consistent view taken by the High Courts is that the authority has to specifically make an offer to the assessee in terms of the first proviso to Section 11AC and in case of failure thereof the assessee cannot be blamed for non payment of the dues in time. The ld. Advocate referring to the

decision of the Gujarat High Court in **Palav Synthetics** (supra) case submitted that even the Tribunal has power to make such offer for the first time at the appellate stage and therefore, this is a fit case for such exercise and to make the necessary offer to the appellants in the case in hand.

5. The DR on the other hand has submitted that the statutory provision nowhere makes it obligatory for the assessing authority to make specific offer in terms of first proviso to Section 11AC and ignorance of law cannot be the basis to defeat the valid order passed by the adjudicating authority.

6. The first proviso to Section 11AC read thus:-

> "PROVIDED that where such duty as determined under sub-section (2) of section 11A, and the interest payable thereon under section 11AB, is paid within thirty days from the date of communication of the order of the Central Excise Officer determining such duty, the amount of penalty liable to be paid by such person under this section shall be twenty-five per cent of the duty so determined.

7. The said proviso is followed by three further provisos and followed by explanation clause and the same read as under:-

> "PROVIDED FURTHER that the benefit of reduced penalty under the first proviso shall be available if the amount of penalty so determined has also been paid within the period of thirty days referred to in that proviso:
>
> PROVIDED ALSO that where the duty determined to be payable is reduced or increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the court, then, for the purposes of this section, the duty, as reduced or increased, as the case may be, shall be taken into account:
>
> PROVIDED ALSO that in case where the duty determined to be payable is increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the court, then, the benefit of reduced penalty under the first proviso shall be available, if the amount of duty so increased, the interest payable thereon and twenty five per cent of the consequential increase of penalty have also been paid within thirty days of the communication of the order by which such increase in the duty takes effect.

Explanation: For the removal of doubts, it is hereby declared that-

(1) the provisions of this section shall also apply to cases in which the order determining the duty under sub-section (2) of section 11A relates to notices issued prior to the date on which the Finance Act, 2000 receives the assent of the President;

(2) any amount paid to the credit of the Central Government prior to the date of communication of the order referred to in the first proviso or the fourth proviso shall be adjusted against the total amount due from such person".

8. Plain reading of the first proviso would reveal that the same is attracted only in cases where the duty amount alongwith interest determined by the assessing authority is paid within a period of 30 days from the date of communication of the order determining such duty alongwith 25% of the duty as penalty. In other words, once the assessing authority determines the duty liability of the assessee and orders payment of interest and penalty, then if the assessee pays such duty amount alongwith interest payable thereon and 25% of the duty as penalty within thirty days from the receipt of the order communicating the determination of duty liability, certainly, the assessee would be entitled to avail the benefit assured under the such proviso. The benefit assured is restricted to the penalty amount. In case the duty liability alongwith interest as also 25% of the duty as penalty is paid, then the assessee gets waiver of 75% of the penalty. The benefit under the proviso, therefore, is restricted to 75% of the penalty amount.

9. Plain reading of the said proviso also discloses that there can be hardly any occasion for the assessee to doubt about the quantification either about the amount of interest or the penalty amount required to be paid in terms of the said proviso to avail the benefit thereunder. Perusal of the provisions of law comprised under Rule ~~68~~ 6 of the Central Excise Rules,

2002 would reveal the manner of calculation of the duty and interest payable by the assessee in case of self assessment. No different mode of payment of duty and interest has been prescribed without the determination of duty liability by the assessing authority. Being so, neither there is specific provision, making it obligatory for the assessing authority to specify about availability of option under the said proviso to the assessee nor there can be an occasion for any confusion in the mind of the assessee about the quantification of the interest or the penalty amount, once the duty amount is quantified and communicated to the assessee.

10. Perusal of the proviso to Section 11AC would disclose that it makes abundantly clear in order to avail the benefit under the first proviso in relation to the reduced amount of penalty, the same has to be paid within thirty days from the date of communication of order regarding the duty liability. Obviously, the period of thirty days starts running from the date of communication of the order determining the duty amount.

11. As far as the decisions which are sought to be relied upon are concerned, first such decision is in the matter of **K.P. Pouches (P) Ltd.** case. In the said case, the assessee had deposited the entire duty amount well before the issuance of the show cause notice. In the background of the said fact, the Hon'ble High Court held that the authorities erred in denying the benefit of the first proviso to Section 11AC. Apparently, the decision was delivered in the peculiar facts of the case. Even plain reading of the discussion regarding the facts of the case and law applicable thereto in the

said decision would reveal that there was no interpretation as such of the first proviso to Section 11AC.

12. Regarding the remaining decisions relied upon, it is to be noted that the first decision in that regard was in the matter of **J.R. Fabrics (P) Ltd.** case, therein the Hon'ble Punjab & Haryana High Court while referring to the facts of the case has clearly recorded thus:-

> "When we examine the facts of the present case in the light of the aforesaid provision, it becomes evident that the total amount of duty amounting to Rs. 6300/- was paid on 15.2.2003 and an amount of Rs.5,04,695/- was paid on 18.2.2003. Accordingly a total amount of excise duty of Rs. 5,10,995/- stood paid by 18.2.2003 whereas adjudicatory order in original was issued on 30.4.2004. It is further appropriate to mention that the dealer-respondent had also deposited interest of Rs. 1,11,373/- on 27.10.2003 which has been appropriated by the order in original passed on 30.04.2003.
>
> The order in original also imposes penalty of Rs. 5,10,995/- which is equal to the amount of duty of excise assessed by the Adjudicating Authority".

13. The Hon'ble High Court further has recorded in the order that "an appeal was filed and the Tribunal reduced the penalty to 25% of the total amount of duty of excise as assessed by the concerned officer".

14. In the above recorded facts, the Hon'ble High Court held that "amount of 25% imposed as penalty is not because any discretion is vested in the Court or the Tribunal but because of 1st and 2nd provisos incorporated by the Parliament w.e.f. 12.05.2000".

15. In other words, the High Court clearly held that it is under the statutory provision that the assessee is entitled to avail the benefit of waiver of 75% of the penalty in case the assessee complies with the conditions imposed under the 1st and 2nd proviso to Section 11AC. The decision

nowhere holds that it is obligatory for the adjudicating authority to make a specific offer in that regard as such.

16. In **Exotic Associates** case, the Gujarat High Court after referring to the decision of the Punjab & Haryana High Court in **J.R. Fabrics** case held thus:-

> "Considering the above judgement of the Delhi High Court as well as Punjab & Haryana High Court and further considering the impugned order of the Tribunal, we are of the view that the matter requires to be considered a fresh in light of the above decisions of the Delhi High Court as well as Punjab & Haryana High Court. It is an admitted position that the assessee was not given any option as to whether he wants to pay the duty demand within 30 days from the date of the adjudication order and in that case, he has to pay only 25% of the penalty".

17. In other words, because the option was denied to the assessee, the Hon'ble High Court considered the action on the part of the authorities to be bad in law. The decision nowhere interpretes the proviso to Section 11AC to mean that it prescribe an obligation upon the authority to make specific offer in the order itself for payment of 25% of the penalty.

18. The decision in **Gopal Fibres** merely follows the view taken by the Gujarat High Court in **Exotic Associates** case.

19. As regards **Palav Synthetics** case is concerned, the decision was delivered in relation to the contention of the revenue that the order of the Tribunal was a non speaking order. In that regard referring to the decision of the coordinate Bench in **CCE & C** vs. **Rama Synsilk Mills Pvt. Ltd.** reported in 2010 (254) ELT 277 the Hon'ble High Court held that it was not possible to hold that the order of the Tribunal suffered from any legal infirmity.

20. In short, none of the decisions sought to be relied upon lays down the law as such in relation to 1st proviso to Section 11AC, as sought to be canvassed on behalf of the appellants.

21. Added to above, as already pointed out, as the facts of the case clearly disclose that the appellants had not paid the entire duty even within the period of 30 days after determination. Being so, the basic and elementary condition to claim the benefit under the said proviso was not complied with by the appellants and, therefore, there is no question of granting any benefit under the said proviso to the appellants.

22. For the reasons stated above, therefore, we do not find any case for grant of relief as prayed for. Hence, the application is dismissed.

(Justice R.M.S. Khandeparkar)
President

(Rakesh Kumar)
Member (Technical)

Pant