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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

Date 15/11/2010

Appeal No. E/924 - 925 /2009 – SM[BR]

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

To :
C.C.E. KANPUR
117/7, SARVODAYA NAGAR, KANPUR 208005.

Appellant

C.C.E. KANPUR

Vs
Respondent

M/S QUALITY LAMINATORS,

I am directed to transmit herewith a certified copy of **Final order No.** 1232 -1233 /2010-SM[BR] dated 27.10.2010 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 QUALITY LAMINATORS,
   9-INDUSTRIAL ESTATE, KALPI ROAD, KANPUR.
2. Adv. / Consult
   NONE:-----------------

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)

3. SHRI RAJIV MOHAN TIWARI, AUTHORISED SIGNATORY OF M/S QUALITY LAMINATORS,9-INDUSTRIAL ESTATE, KALPI ROAD, KANPUR.

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI
Court No.IV

E/Appeal No. 924-925/2009-SM

(Arising out of order in appeal No.13-14/CE/Appl/KNP/09 dated 15.1.2009 passed by the Commissioner of Central Excise (Appeals), Kanpur)

Date of Hearing: 27.10.2010

For approval and signature:

Hon'ble Mrs Archana Wadhwa, Member (Judicial)

1. Whether Press Reporters may be allowed to see CESTAT (Procedure) Rules, 1982? No
2. Whether it should 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? No.
4. Whether Order is to be circulated to the Departmental Authorities? Yes

CCE, Kanpur — Appellants

Vs

1. M/s Quality Laminators
2. Shri Rajiv Mohan Tiwari — Respondent

Appeared for the Appellant: Shri S.K. Bhaskar, DR
Appeared for the Respondent: None

Coram: **Hon'ble Mrs. Archana Wadhwa ,Member (Judicial)**

Final ORDER 1232 - 1233 / 2010 SM (BR)

Per Archana Wadhwa:

Being aggrieved by the order passed by the Commissioner (Appeals) under which he has set aside the penalty imposed on the respondent while confirming the demand of duty, Revenue has filed the present appeal.

2. I have heard Shri S.K. Bhaskar, learned DR appearing for the Revenue. No body appeared for the respondents.

3. As per the facts on record, the respondent factory was visited by the Central Excise officers on 5.9.2006 who conducted various checks and verifications. As a result, shortages in the stock of raw material to the extent of Rs.10,57,648/- were detected. Shri Rajiv Mohan Tiwari, authorized representative of the factory admitted the shortage in his statement recorded on the spot and also debited the duty of Rs. 1,69,224/- along with debit of cess of Rs. 3,384/-.

4. On the above basis, proceedings were initiated against the respondents by way of issuance of show cause notice dated 31.7.2007 proposing to confirm demand of Rs. 1,72,608/- on account of Central Excise duty as well as cess alongwith confirmation of interest. Notice also proposed imposition of penalty on manufacturing unit as also on the authorized signatory. The said show cause notice culminated into an order passed by the original adjudicating authority confirming the demand of duty and imposition of equal penalty under Section 11AC of Central Excise Act. In addition, penalty of Rs. 10,000/- was imposed on Shri Rajiv Mohan Tiwari, authorized signatory under Rule 26 of Central Excise Rues, 2002.

5. The said order was challenged by the appellants before Commissioner (Appeals) only in respect of imposition of penalties in as much, the duty confirmed was accepted by the appellants. The appellants main contention was that in as much as, duty was

deposited before the issuance of the show cause notice, no penalty should have been imposed on them in view of the law declared in the case of Shree Krishna Pipe Industries reported in 2004 (61) RLT 17, Gaurav Mercantile Ltd reported in 2005 (190) ELT 11 (Bom.).

6. While dealing with the above contention of the assessee, the Commissioner (Appeals) observed that duty element has not been challenged by the appellants. However, he further observed that as there is no corroborative evidence on record to conclude that the shortages found were on account of definite clandestine removal and by taking note of the fact that the duty was deposited before issuance of show cause notice, he held that no penalty is imposable, once duty has been paid before the issue of show cause notice. He accordingly set aside the penalty imposed upon both the respondents. The said order is impugned before the Tribunal.

7. After going through the impugned order, I find that the assessee is not agitating the confirmation of payment of duty against them. The learned DR has drawn my attention to the statement of Shri Tiwari, authorized signatory, recorded on the date of visit of the officers wherein he clearly deposed that the said goods were cleared from the factory premises without issuing any invoice and without payment of duty due thereon by their staff in his absence. The duty was subsequently paid by them.

8. In the light of the above statement and in the light of the fact that the assessee has not challenged the confirmation of demand of duty, it has to be held that the goods were cleared clandestinely by the said respondent. There is no other explanation by the assessee in

respect of the shortages so detected. It may be kept in mind here that this not a case where the evidentiary value of the statement of the authorized representative is required to be gone through or the fact of availability or absence of any corroborative evidence is required to be considered. Here the assessee himself accepted the duty liability confirmed by the adjudicating authority on account of clandestine removal and only challenged the imposition of penalty upon them, it was not open to the Commissioner (Appeals) to give a finding as regards the presence or absence of corroborative evidences, so as to arrive at a finding of clandestine removal. The only question required to be decided by the Commissioner (Appeals) was imposition of penalty upon the respondent.

9. The law on the issue of imposition of penalty to the extent of 100% of duty stand declared by Hon'ble Supreme Court in the case of Dharmendra Textile Processors as reported in 2008 (231) ELT 3 (SC). In view of the above, I restore the order of the original adjudicating authority imposing 100% penalty. However, no option was given by the original adjudicating authority to deposit the entire dues and penalty within 30 days of passing of the order by him, in which case the penalty is required to be reduced to 25% of the duty amount in terms of proviso to Section 11AC. Tribunal in the case of Swati Chemicals & Others 2009 (94) RLT 684 (CESTAT) and the judgment of the Hon'ble High Court of Gujarat in the case of M/s Exotic Associates Vs CCE as reported in 2010 (252) ELT 49 (Guj), has held that where no such option has been extended by the lower authorities, the same can be extended by the Tribunal. In view of the law declared above, I

extend the option to the appellant to deposit entire duty, interest and 25% of the penalty within a period of 30 days from the date of passing of the present order, in which case the penalty shall stand reduced to 25% of the duty.

10. The Revenue's appeal is disposed of in the above terms.

(ARCHANA WADHWA)
Judicial Member

MPS*