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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/630 /2009,826 /2009 – SM[BR] Date 16/11/2010

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

To :
M/S GARG TUBES LTD.

9TH KM STONE , VILLAGE- ACCHEJA,P.O. DUJANA,
DISTT. GAUTAM BUDH NAGAR.

M/S GARG TUBES LTD. Appellant
Vs
C.C.E. GHAZIABAD Respondent

I am directed to transmit herewith a certified copy of **Final order No.** 1253 – 1254 / 2010-SM[BR] dated 21.10.2010 passed by the Tribunal under Section 35-C(1)of Central Excises Act, 1944

Assistant Registrar
(SM Appeal Branch)

Copy to :
1. Respondent
   C.C.E. GHAZIABAD
   C.G. O. COMPLEX-II, KAMLA NEHRU NAGAR, GHAZIABAD 201302
2. Adv. / Consult
   MR.RAJESH CHHIBBER
   FA/9, NEW KAVI NAGAR, GHAZIABAD

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. M/S GARG TUBES LTD.
9TH KM STONE, VILLAGE-ACCHEJA, P.O.DUJANA, DISTT.
GAUTAMBUDH NAGAR, (U.P)

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI
PRINCIPAL BENCH, COURT NO. III

Excise Appeal No. 630 of 2009-SM(BR)

M/s. Garg Tubes Ltd. — Appellants

Vs.

Commissioner of Central Excise
Ghaziabad — Respondent

Excise Appeal No. 826 of 2009-SM(BR)

Commissioner of Central Excise
Ghaziabad — Appellants

Vs.

M/s. Garg Tubes Ltd. — Respondent

[Arising out of Order-in-Appeal No. 311/CE/GZB /2008 dated 30.12.2008 passed by the Commissioner of Central Excise (Appeals), Meerut II.]

For approval and signature:

Hon'ble Mr. Ashok Jindal, Member (Judicial)

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1. Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982? :

2. Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not? :

3. Whether Their Lordships wish to see the fair copy of the Order? :

4. Whether Order is to be circulated to the Departmental authorities? :

Appearance: Shri Rajesh Chibber, Advocate for the Appellants
Shri S.K. Bhaskar, DR for the Respondent

Date of Hearing/decision : 21.10.2010

Final **ORAL ORDER NO. 1253-1254/2010 SM (BR)**

Per Ashok Jindal:

The assessee as well as Revenue are in appeal against the impugned order. The facts of the case are that during the course of investigation in the factory premises of the assessee shortage of raw material and finished goods was found and the assessee admitted the same and paid the duty voluntarily. Thereafter, the show cause notice was issued for appropriation of duty paid and proposal of penalty under Rule 25 read with section 11AC of the Act. The adjudicating authority confirmed the demand and imposed equivalent amount of penalty under Rule 25 read with section 11AC of the Act. On appeal, the Commissioner (Appeals) reduced the penalty observing that there is no collaborative evidence of clandestine removal and the ingredient of section 11AC are not fulfilled, the penalty under section 11AC was not imposable but reduced the penalty under Rule 25 of the Central Excise Rules, 2002 to Rs. 2,43,086/- from Rs.9,72,343/-.

2. Revenue is in appeal against the reduction of penalty and assessee is in appeal against the confirmation of penalty. The learned Advocate appearing on behalf of the assessee submitted that during the course of investigation, they have explained the reasons for shortages of inputs as

well as of finished goods. In the reason they have stated that they are recording their productions of raw material on the basis of standard formula obtained by them and for over a period of time there may be evaporation which may cause shortage of raw material as well as of finished goods and there is no collaborative evidence against the assessee that they have any intention to clear the inputs or finished goods clandestinely without paying the Central Excise duty. He also submitted that in their own case for the earlier period, this Tribunal, vide order No. 970/2008 SM dated 13.3.08 on similar facts, has dropped the penalty under Rule 25 of Central Excise Rules, 2002 read with section 11AC of the Act.

3. On the other hand, the learned DR submitted that although the Commissioner (Appeals) has not imposed penalty under section 11AC but under Rule 25 of the Central Excise Rules, 2002, the penalty equivalent to duty imposed on short found goods during the course of investigation. Moreover, for earlier period also there were shortages in the factory of the assessee Hence, they are habitual offenders and he further submitted that penalty on the assessee is to be imposed equal to duty.

4. Heard both sides.

5. I have carefully examined the submissions made by both sides and the records. From the perusal of the record both shortages of inputs and finished goods were found in the factory premises of the assessee but they have not been collaborated by any evidence that the assessee has any intention to clear the said goods without payment of Central Excise duty.

Moreover, the Commissioner (Appeals) has categorically held in para 5.3 of the impugned order as under:

> "I find that the lower authority has failed to bring on record any evidence to show as to how the appellants removed the raw material (inputs) clandestinely. Section 11 AC of the Central Excise Act, 1944 itself is not invokable when clandestine removal is not proved or substantiated by the department. In the impugned order in original, under the discussion and findings, there is no mention of clandestine removal."

6. In the absence of any ingredients of section 11AC, penalty under Rule 25 of Central Excise Rules, 2002 is not sustainable. As held in the assessee own case for the earlier period, this Tribunal has also held that no penalty is imposable in the absence of any collaborative evidence to show that there was any intention to remove the goods without payment of Central Excise duty. Following the same in this case also Revenue has failed to prove with collaborative evidence that the assessee has any intention to remove the impugned goods without payment of Central Excise duty. Accordingly, the penalty under Rule 25 read with section 11AC is not imposable in this case. Hence the appeal filed by the assessee is allowed and appeal filed by the Revenue is rejected with consequential relief.

(Ashok Jindal)
Member(Judicial)

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