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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/1738/2008-1739/2008 – SM[BR] and E/CO/354-355/2008-SM Date 06/07/2010

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

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

C.C.E. KANPUR Appellant

Vs

M/S SHAKTI GRAMODYOG SANSTHAN, Respondent

I am directed to transmit herewith a certified copy of **Final order No.** 689 – 690 / 2010 –SM[BR] dated 25.6.2010 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 SHAKTI GRAMODYOG SANSTHAN,
   C-19, SITE-C, INDUSTRIAL ESTATE, SIKANDRA, AGRA.
2. Adv. / Consult SHRI BIPIN GRAG ADV.
   B-1/1289-A, VASNT KUNJ NEW DELHI

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 RAKESH GUPTA, AUTHORISED SIGNATORY OF M/S SHAKTI GRAMODYOG SANSTHAN, C-19, SITE-C, INDUSTRIAL ESTATE, SIKANDRA, AGRA.

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

Date of Hearing/Decision:11.06.2010

Excise Appeal No.1738-1739/08 -SM and
Excise CO No. 354-355/08-SM

[Arising out of Order-in-Appeal No.244-245/CE/APPL/KNP/ 2008 dated 30.05.2008 passed by the Commissioner (Appeals) Kanpur].

CCE, Kanpur ...Appellants

Vs.

M/s. Shakti Gramodyog Sansthan
Rakesh Gupta, Authorized Signatory ... Respondent

Present for the Appellant :Shri.I. Baig, SDR
Present for the Respondent:Shri.Bipin Garg, Advocate

Coram: HON'BLE MR.DN.PANDA, JUDICIAL MEMBER

Final **ORDER NO.** 689 - 690/2010 SM (BR) **DATED:11.06.2010**

PER: D.N.PANDA

In both the cases ld. DR submits that there was no evidence to grant any relief on excise duty to the appellant. The shortage having been found without any evidence, penalty was exigible. Ld. Commissioner (Appeals) simply granted waiver of penalty on the ground that the duty was paid before issuance of show cause notice. Revenue is against penalties in both the appeals. The law which has been relied by the ld. Commissioner for concession, no more being a good law after the decision of the Hon'ble Supreme Court in the case of Union of India vs. Rajasthan Spinning & Weaving Mills reported in 2009 (238) E.L.T. 3 (S.C.), the respondent have to suffer penalty.

2. Ld. Counsel appearing on behalf of the respondent submits that the law what that was prevailing has guided the ld. Appellate Authority to decide the matter in favour of the respondents. He does not dispute the Apex Court decision which has brought out radical change in penalty aspect by the pronouncement of Rajasthan Spinning Mills case.

3. Heard both sides and perused the records. Reading of the appellate order at page 3 does not sharply disclose the mensrea that calls for the penalty. The essential ingredient of the decision in Rajasthan Spinning Mills case is that there should be clear finding about any of the five elements of section 11AC of Central Excise Act 1944 to bring the defaulter to penal consequences of law. In short, the mens-rea has also to be brought to record to impose penalty. Ld. Appellate Authority decided on the basis of the law which was prevailing at the relevant point of time to guide him. When the law has been declared by the Apex Court in Rajasthan Spinning Mills case the appellant deserves a fair hearing before him. For a clear finding in accordance with the ratio laid down therein.

4. Aforesaid observation calls for remand of the order to the ld. Appellate Authority to do justice to both the sides. It may be stated that when the penalty becomes imposable, the ld. Appellate authority shall take into consideration the statutory provisions in third proviso to section 11AC of the Central Excise

Act 1944 read with decision of the Hon'ble High Court of Delhi in K.P. Pouches (P) Ltd. vs. Union of India reported in 2008 (228) ELT 31 Delhi and most particularly para 27 which reads as under:-

> *27. To obviate any similar situation from arising in future, we are of the opinion that in its adjudication order the adjudicating authority under the Act should explicitly state the options available to the Assessee under Section 11AC of the Act. Once the choices are made known to the Assessee and it still does not take advantage of the first proviso to Section 11AC of the Act, it will be entirely at its own peril. Therefore, it would be beneficial, both from the point of view of the Revenue as well as the Assessee, if the options available to the Assessee are mentioned in the adjudication order itself."*

5. With the aforesaid observations both the appeals are disposed by way of remand to the ld. Appellate Authority, setting aside the first appellate order to the limited extent, as indicated above.

Cross objection also stands disposed of.

[Dictated & Pronounced in the open Court].

(D.N.PANDA)
JUDICIAL MEMBER

Anita