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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/1507/2008 – SM[BR] Date 07/07/2010

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

To :
M/S ALERT INDIA PVT. LTD.
C-7, SITE-C,UPSIDC INDUSTRIAL
AREA,SIKANDRA,AGRA.
M/S ALERT INDIA PVT. LTD. Appellant

Vs

C.C.E. KANPUR Respondent

I am directed to transmit herewith a certified copy of **Final order No**. 717 / 2010 –SM[BR] dated 24.6.2010 passed by the Tribunal under Section 35-C(1)of Central Excises Act, 1944

Assistant Registrar
(SM Appeal Branch)

Copy to :

1. Respondent
   C.C.E. KANPUR
   117/7, SARVODAYA NAGAR, KANPUR 208005.
2. Adv. / Consult
   MR. HEMANT BAJAJ ADV.
   A-5, BASMENT LAJPAT NAGAR –III,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)

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

Excise Appeal No. 1507 of 2008-SM(BR)

[Arising out of Order-in-Appeal No. 40/CE/APPL/KNP/2008 dated 6.2.2008 passed by the Commissioner of Central Excise (Appeals), Kanpur (UP)]

For approval and signature:

Hon'ble Mr. M. Veeraiyan, Member (Technical)

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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? : 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

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M/s. Alert India Pvt.Ltd. Appellants Glass
Works Ltd.

Vs.

Commissioner of Central Excise Respondent
Kanpur

Appearance: Shri Hemant Bajaj, Advocate for the Appellants
Shri S.N. Singh, Jt.CDR for the Respondent

Date of Hearing/decision : 24.6.2010

Final **ORAL ORDER NO. 717/2010 SM (Br)**

Per M. Veeraiyan:

This is an appeal against the order of the Commissioner (Appeals) No. 40/CE/APPL/KNP/2008 dated 6.2.2008.

2. Heard both sides.

3. The relevant facts, in brief, are that when the premises of appellants were visited, there was substantial shortage of inputs on which credit was taken. As against 12800 Kgs. of stock of DOP plasticizer as per the records, the stock available was only 2800 Kgs. and thus there was a shortage of 10000 Kgs. Similarly, as against the book stock of 6000 Kgs. of PVC resin, the available stock was only 1000 Kgs. and thus there was shortage of Rs.5000 Kgs. The officers also noticed slips numbering 14, which indicated date-wise from 5.10.05 to 10.11.05 clearances of pairs of footwear soles of different size at rates such as Rs. 23/-, Rs.21/- , Rs.25/- etc. Shri Gurucharan Lal, GM admitted the shortage of inputs and clandestine removal of footwear soles in his statement given under section 14 of the Central Excise Act on 11.11.05. Though a letter dated 12.11.05 was issued contesting the statement given, the appellant company paid the duty on the goods cleared as per slips and also reversed Cenvat credit on short found raw materials on 14.11.05. The original authority confirmed the demand of duty and imposed equal amount of penalty under section 11AC. The appellant filed appeal before the Commissioner (Appeals) and did not challenge the duty liability but challenged the imposition of penalty on the ground that they have paid the entire duty due even before issue of show

cause notice and that there was no corroborative evidence in respect of allegation of clandestine removal. Commissioner (Appeals) rejected the appeal of the party.

4. Learned Advocate for the appellant submits that inasmuch as they have not contested the duty liability before the Commissioner (Appeals), he is not contesting the duty liability before the Tribunal also. However, he submits that inasmuch as they have paid the entire duty due and there is no corroborative evidence in respect of allegation of clandestine removal, the imposition of penalty may not be sustained. Alternatively, he submits that the penalty should be reduced to 25% as provided under first proviso to section 11AC inasmuch as they have paid the entire duty before issue of show cause notice. He relies on the decision of the Hon'ble High Court of Delhi in the case of K.P. Pouches vs. Union of India [2008 (228) ELT 31 (Del)] wherein it has been held that the adjudicating authority are duty bound to indicate the option available to the assessee about the payment of 25% of penalty and the conditions for availing the said concession. He also relied on the decision of the Tribunal in the case of CCE, Vadodara vs. Swati Chemical Indus. Ltd. [2009 (248) ELT 421 (Tri-Ahmd)] which has given similar concession after considering the decision of the Hon'ble Supreme Court in the case of Union of India vs. Dharmendra Textile Processors reported in [2008 (231) ELT 3 (SC)] and the decision of Hon'ble High Court in the case of CCE vs. J.R. Fabrics Pvt. Ltd. reported in [2009 (238) ELT 209 (P&H)] and the decision of Delhi High Court in the

case of CCE vs. Malbro Appliances Pvt. Ltd. reported in [2007 (208) ELT 31 (Del)}.

5. Learned Jt.CDR submits that there is no option left to the adjudicating authorities except to impose penalty equal to duty evaded as clearly held by the Hon'ble Supreme Court in the case of Union of India vs. Rajasthan Spinning & Weaving Mills reported in [2009 (238) ELT 3 (SC)] which decision specifically has been rendered after noting the entire provisions of section 11 AC. He also submitted that the Central Board of Excise & Customs has issued circular No. 889/09/20090CX dated 21.5.2009 clarifying that in the light of decision of the Supreme Court in the case of Dharmendra Textile Processors, there is no discretion to reduce the mandatory penalty equal to duty even though the duty is paid before the issue of show cause notice. Therefore, he seeks upholding the penalty sustained by the Commissioner (Appeals).

6. I have carefully considered the submissions from both sides. The duty liability is not being disputed, as the same has not been disputed before the Commissioner (Appeals). The dispute is only in relation to whether penalty is to be sustained and whether it is permissible to reduce the penalty invoking the first proviso to Section 11AC.

7. Learned Jt.CDR submits that in the light of the decision of the Hon'ble Supreme Court in the case of Rajasthan Spinning and Weaving Mills cited supra, there is no discretion in imposing reduced penalty under section 11AC. It is not in dispute that first proviso to section 11 AC has provided for reduced penalty. The issue regarding the reduced penalty in

terms of first proviso to section 11AC was not specifically before the Hon'ble Supreme Court in the case of Rajasthan Spinning and Weaving Mills case. On the other hand, Hon'ble High Court of Punjab and Haryana in the case of J.R. Fabrics (P) Ltd., had considered the applicability of proviso to section 11 AC after the judgement of the Hon'ble Supreme Court in the case of Dharamendra Textile Processors case and has concluded as under:

> "**15.** The argument of the Revenue that the judgment in *Dharamendra Textile Processor's* case (supra) would apply and penalty equal to the amount of duty of excise assessed by the Assessing Authority is to be paid. We are afraid that such an argument would not be available because judgment in *Dharamendra Textile. Processor's* case (supra) dealt with Section 11AC of the Act and has concluded the mandatory nature of the penalty contemplated by the proviso. In para 26, reference has been made to the Union Budget of 1996-97, when Section 11AC of the Act was introduced. It was then clarified that there was no scope for any discretion and the levy of penalty is of mandatory character, Hon'ble the Supreme Court further placed reliance on the Notes on Clauses concluding that similar indication has been given therein. It appears that provisos 1st and 2nd which were added in the year 2000 were not the subject matter of consideration before their Lordships in *Dharamendra Textile Processors'* case (supra). Therefore, we find no substance in the contention raised on behalf of the revenue especially in the face of express provision made by the four provisos in the year 2000".

Therefore, the applicability of proviso to section 11AC has to be considered.

8. In the present case, it is noticed that there was substantial shortage of inputs on which credit has been taken. A feeble attempt to say that the shortage was due to removal of the goods to the shop floor is also not sustainable. It could not be the case that 10,000 Kgs. of DOP has been issued to the shop floor as normal issue was found to be only 1200 Kgs. At any rate, the slips recovered indicate clearances of goods date wise and rates were also indicated. The General Manager in his statement given under section 14 admitted the veracity of details given in the slips. This has been followed up by payment of duty involved. This is a clear case attracting the provisions of section 11AC. In terms of first proviso to section 11AC, the assessee against whom the demand of duty is confirmed is to be given an option to pay 25% of the penalty amount within 30 days from the date of communication of the order subject to the conditions mentioned therein. The decision of the Hon'ble High Court in the case of Malbro Appliances and K.P. Pouches Ltd. and J.R. Fabrics Pvt. Ltd. envisage that the adjudicating authority gives the option in the order itself regarding the availability of concessional penalty in terms of first proviso to section 11 AC. Regarding the reliance placed by the learned Jt. CDR on the Board's instructions dated 21.5.09, it is apparent that the said clarification has not been taken into account, the interpretation of section 11 AC and the proviso to section 11AC rendered by Hon'ble High Court of Punjab and Haryana in the case of JR Fabrics cited supra.

9. In view of the above, the appeal is disposed of as follows:

(a) The duty demand is upheld as uncontested.

(b) Penalty imposed under section 11 AC is upheld. However, the appellant is given an option to pay 25% of the penalty amounting to Rs.50322.25 (Rupees Fifty thousand three hundred twentytwo and twenty five paise only) provided the said amount is paid within 30 days from today. If this amount is not paid within 30 days as stipulated, the penalty will stand as Rs. 2,01,289/-.

(M. Veeraiyan)
Member(Technical)

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