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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/1159/2010 – SM[BR] AND E / STAY / 1217 / 2010 –SM[BR] Date 26/07/2010

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

To :
M/S. KUMAR CONTAINERS
F-21 & 22, INDUSTRIAL ESTATE, MAKRAND NAGAR,
KANNAUJ, FARUKHABAD.
M/S. KUMAR CONTAINERS Appellant
Vs
C.C.E. LUCKNOW Respondent

I am directed to transmit herewith a certified copy of **Final order No**.797 / 2010 –SM[BR]&S/320 /2010 dated 20.7.2010 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. LUCKNOW
7-A, ASHOK MARG, LUCKNOW.
2. Adv. / Consult
MR.BHASIN SETHI & ASSICIATE
401,SATYAM CINEMA BUILDING,RANJEET NAGAR,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)

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

West Block No. 2, R.K. Puram,
NEW DELHI

COURT No. II

E/STAY/1217 OF 2010 IN AND APPEAL NO. E/1159 OF 2010-SM

[Arising out of Order-in-Appeal No. 49-CE/LKO/2010 dated 23.02.2010 passed by the Commissioner (Appeals), Central Excise, Lucknow]

M/s. Kumar Containers — Appellants
Reptd. By Shri V.R. Sethi, Advocate

Versus

CCE, Lucknow — Respondent
Reptd. By Shri I. Baig, DR,

Date of Hearing/decision: 12th July, 2010

Coram: Hon'ble Shri D.N. Panda, Judicial Member

FINAL ORDER NO. 797/2010 SM (BR) **DATED**
S-320/2010 SM (BR)

Per D.N. Panda:

Both sides are on dispute for the confusion of the law governing levy of penalty. While claim of the assessee is that it has discharged duty demand on 16th May, 2008 along with interest in respect of allegation made out on the basis of investigation made on 15th May, 2008, and not liable to penalty, Revenue's contention is that there shall be penalty to the extent of 100 per cent of the duty demand.

2. The appellant pleads that it has already discharged penalty to the extent of 25% of the duty demand by 20th March, 2009 which is claimed to be within one month of issuance of show cause notice. The amount paid was Rs. 45,650/-. Also noticing that there was short payment of Rs. 1369/- the appellant has discharged such liability on 4.8.2009.

3. While the matter stood as above, learned Advocate for appellant submits that the Adjudicating authority found that the duty element having been discharged by the appellant, penalty should be limited to the extent of 25%. But Revenue went in appeal against the order of the learned Adjudicating authority. The appellate authority imposed the penalty of Rs. 1,88,076/- which is equal to the amount of duty and that is contrary to law. Being aggrieved by that order the appellant has filed present appeal as well as stay application which deserve to be allowed. Learned D.R. appearing for Revenue supports the appellate order.

4. Considering the fact that the duty element and the penalty to the extent of 25% of duty has been discharged by the appellant, requirement of pre-deposit is waived.

5. When the controversy is reduced to the aforesaid extent it is no longer required to roll on the dispute on record of the Registry. Therefore, appeal is taken up for disposal.

6. The issue involved in this appeal is whether there shall be 100% penalty on the appellant on the aforesaid circumstances. Learned Adjudicating Authority has examined the issue and found that statutory concession is permissible to the appellant in respect of penalty, limiting the same to 25% of the duty element involved. Hon'ble High Court of Delhi has tested the ~~present~~ issue like the present one in para 27 of the judgment in the case of K.P. Pouches, reported in 2008 (228) ELT 31 (Tri.). For convenience of reading the said para is reproduced below:-

"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."

7. In view of the concession granted under the law as above which is based on factual evidence the Adjudicating authority shall grant option and examine the ~~falt~~ fact relating to payment of amount in dispute and pass appropriate order. This remand is made to the limited extent of examination of dates and factual aspect ~~of~~ without adjudication of the entire issue.

7. In result, both stay application and appeal are disposed off setting aside the appellate order to the above extent and upholding the adjudication order except to the extent stated above.

(Dictated & pronounced in the Open Court.)

(D.N. PANDA)
JUDICIAL MEMBER

R.K