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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/1725/2008 – SM[BR] E/CO/334/2008-SM[BR] Date 03/08/2010

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 P & J AEROMATICS (UNIT NO.II) Respondent

I am directed to transmit herewith a certified copy of **Final order** No. 861 / 2010-SM[BR] dated 8.7.2010 passed by the Tribunal under Section 35-C(1)of Central Excises Act, 1944

Assistant Registrar
(SM Appeal Branch)

Copy to :
1. Respondent
   M/S P & J AEROMATICS (UNIT NO.II)
   GEETA NAGAR, BALKESWAR, AGRA.
2. Adv. / Consult SHRI BIPIN GARG ADV.
   B-1/1289-A , VASANT 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)

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block 2, R.K.Puram,New Delhi-110066
Principal Bench, New Delhi.

E/1725/08 & E/CO/334/08-SM

(Arising out of Order-in-Appeal No.239-CE/APPL/KNP/2008 dt.30.5.08 passed by the Commissioner(Appeals), Kanpur)

For approval and signature:

Hon'ble Mr. Rakesh Kumar, Member (Technical)

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 would 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 Department Authorities:	:

CCE, Kanpur — Appellant

Vs

M/s. P&J Aeromatics(Unit-II) — Respondent

Appearance
Shri R.K.Gupta, DR For Appellant

Shri Bipin Garg, Adv. for Respondent

Coram: Hon'ble Mr. RAKESH KUMAR, MEMBER (TECHNICAL)

Final

Date of decision: 8.7.2010
Oral Order No. 861/2010 SM (BR)

Per Rakesh Kumar:

The respondent are manufacturer of various brands of Pan Masala and Gutka chargeable to Central Excise Duty under sub-heading 2040 of Central Excise Tariff. The respondent's factory was visited by the jurisdictional Central Excise Officers on 27.7.06 and at that time the stock of the finished goods was checked. In course of stock checking, shortage was detected in the stock of Geet Brand Gutka and Andaz Brand Gutka, involving duty of Rs.2,04,738/-. Enquiry was made with Shri Yogendra kumar Singhal, Authorised Signatory of the respondent and his statement was recorded on the spot under Rule 14 of Central Excise Act. He accepted the shortage and stated that the goods found short had been cleared without issue of invoice and without payment of duty. He also paid the entre duty in two instalments on 8.1.06 and 4.8.06. Subsequently, the Department issued a show cause notice for confirmation of the duty demand of Rs.2,04,738/- in respect of the goods found short and also for imposition of penalty on the respondent under Section 11AC of Central Excise Act. The show cause notice was adjudicated by the Asstt. Commissioner vide order-in-original dt.8.4.08 by which the duty demand was confirmed, the amount paid towards the demand was appropriated and penalty of equal amount was imposed on the respondent under Section 11AC. On appeal to Commissioner(Appeals), the Commissioner(Appeals) vide order-in-appeal dt.19.5.08 upheld the duty demand but set aside the penalty on the ground that merely on account of the shortage of the finished goods vis.-a-vis. balance in the RG-I register, it cannot be inferred that the goods had been clandestinely cleared and also the entire duty had been paid prior to the issue of show cause notice. Against this, order of the Commissioner(Appeals) setfing aside the penalty, the Department has filed this appeal. In respect of this appeal of the Department, the respondent has filed the cross objection.

2. Heard both the sides.

2.1 Shri R.K.Gupta, learned DR assailing the impugned order pleaded that the fact of shortage of Gutka has not been disputed by the respondent; that the authorized signatory of the respondent company in his statement recorded on the spot not only accepted the shortage but also stated that goods found short had been cleared without issue of invoices and without payment of duty; that in view of this evidence on record the Commissioner(Appeals)'s finding that there is no evidence to prove the clandestine removal of the goods found short, is not correct; that in the case of clandestine removal, mere payment of duty prior to the issue of show cause notice does not save the assessee from the penal provisions of Section 11AC, that this is a case of clandestine removal and hence the provisions of Section 11AC would be attracted and as such Commissioner(Appeals)'s order setting aside the penalty is incorrect.

2.2 Shri Bipin Garg, Advocate, the learned Counsel for the respondent, reiterated the Commissioner(Appeals)'s findings and pleaded that the penalty has been correctly set aside. He, however, pleaded that in case the shortage of the finished goods is treated as clandestine removal, since the entire duty had been paid prior to the issue of show cause notice and inspite of this, the respondent was not given the option to avail the benefit of reduced penalty under first proviso to Section 11AC, as in the adjudication order passed by the Asstt. Commissioner, he straightway imposed the mendatory penalty equal to the duty demand confirmed under Section 11AC without giving option to the respondent to pay penalty of 25% of the duty within 30 days from the date of communication of the order, the ratio of the Hon'ble Delhi High Court's judgment in the case of K.P.Pouches reported in 2008(228)ELT.31 would apply and accordingly, the respondent would be eligible for the benefit of reduced penalty under first proviso to Section 11AC.

3. I have carefully considered the submissions from both the sides and perused the records. In this case, the shortage of the finished goods is not disputed. Looking to quantum of the shortage and the fact that Shri Yogendra Kumar Singhal, Authorized Signatory of the respondent, has not only accepted the shortage but in his statement has also admitted that the same is due to the removal of the goods without payment of duty and without issue of invoice and since this statement has not been retracted and hence is admissible as evidence, I am of the view that in view of this evidence, the Commissioner(Appeals)'s finding. that there is no evidence of clandestine removal, is not correct. Moreover, just because the duty had been paid prior to

the issue of show cause notice would not save the respondent from penalty, if the short payment of duty is due to clandestine removal or a deliberate evasion of duty. Hon'ble Supreme Court in the case of Rajasthan Spinning & Weaving Mills reported in 2009(238)ELT.3 has held that penalty under Section 11AC is imposable if the elements for invoking this section are present. In view of this, I hold that the Commissioner(Appeals)'s order setting aside the penalty under Section 11AC is not correct. However, since in this case the entire duty had been paid prior to the issue of show cause notice and in view of this in accordance with the provisions of the first proviso to Section 11AC an option should have been given to the respondent to pay the reduced penalty in accordance with the first proviso to Section 11AC within the stipulated period but the same was not given, the ratio of Hon'ble Delhi High Court judgment in the case of K.P.Pouches(supra) would apply and accordingly, the respondent cannot be denied the benefit of reduced penalty under first proviso to Section 11AC. In view of the above discussion, the Commissioner(Appeals)'order setting aside the penalty under Section 11AC is set aside and on this point, the Asstt. Commissioner's order is restored. However, in view of the above discussion, the penalty is reduced to 25% of the duty amount. The Department's appeal is allowed and the Cross Objection filed by the respondent stands disposed of as above.

(Rakesh Kumar)
Member Technical

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