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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/2164/2008 – SM[BR] Date 17/08/2010

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

To :
M/S VICTORY IMPEX.,

MOTIA KHAN,MANDI GOBINDGARH.

M/S VICTORY IMPEX., Appellant

Vs

C.C.E. CHANDIGARH Respondent

I am directed to transmit herewith a certified copy of **Final order No**. 891 / 2010 –SM[BR] dated 11.8.2010 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. CHANDIGARH
   C.R. BUILDING, PLOT NO. 19, SECTOR 17-C, CHANDIGARH 160017
2. Adv. / Consult
   MR. 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)

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

Date of Hearing/Decision:04.08.2010

Excise Appeal No.E/2164/08-SM

[Arising out of Order-in-Appeal No.410/CE/CHD/2008 dated 7.9.08 passed by the Commissioner of Central Excise, Chandigarh].

M/s.Victory Impex
Mandi Gobindgarh ...Appellant

Vs.

Commissioner of Central Excise, Chandigarh ... Respondent

Present for the Appellant :Shri.Bipin Garg, Advocate
Present for the Respondent:Shri.S.K.Bhakar, DR

Coram: HON'BLE MR. D.N. PANDA, JUDICIAL MEMBER

Final - **ORDER NO.** 891/2010 SM(BR) **DATED:04.08.2010**

PER: D.N.PANDA

The short point involved in this appeal is when the goods are found in the records of the dealer but not physically found, issuance of no invoice by that dealer for the quantity not found, can bring penal consequence to such dealer. Ld. Commissioner (Appeals) in para 6 of the order came to a conclusion that it is a clandestine removal.

2. Ld. Counsel appearing on behalf of the appellant submits that had there been any issuance of invoice, Revenue's presumption that, that has facilitated for taking of cenvat credit may be probable. But in absence of any invoice issued, the appellant should not be penalized. According to him, to

bring the appellant even under Rule 15, the wilful act or fraud is required to be established by Revenue. That has not been done. Similarly to apply section 11AC of Central Excise Act, 1944 elements of *mensrea* should be present so that penal consequences shall follow. In absence of finding to that aspect, the penalty of Rs.1,90,925/- is unsustainable.

3. Ld. DR supports the order of the authority below and also submits that the dealer was a canalizing agency. There was deviation to law made which invited penal consequence against him.

4. Heard both sides and perused the records.

5. There is no dispute that on 12.4.06 physical inventory revealed shortage of stock in the hands of the dealer-appellant. The dealer is not a manufacturer. There is no evidence on record to show that there was any invoice issued in respect of the goods in question. In absence of any invoice issued, cenvat credit has not been passed on. The guilty intent of the appellant has not been brought on record. Modus operandi does not demonstrate whether there was any design of fraud made by the Appellant to cause loss of Revenue. Also nothing demonstrate that how the contravention has occurred to pass on undue cenvat credit to the buyer. So also destination of goods was not discovered by Revenue to find out loss of Revenue, if any. The Department has not recovered any invoice from the buyer. All these facts suggest that the burden of proof was not discharged by the Revenue.

6. No doubt, there may be a case of stock pilferage. But the dealer not being manufacturer, the pilfered goods whether has escaped duty has not been demonstrated by Revenue. Whether the manufacturer has caused loss of revenue is not enquired. When all these features are absent, because penalty is prescribed by law, that cannot be *ipso facto* imposed. It may be stated that penal proceedings are quasi criminal in nature. Clear intention of evasion or an intention to cause evasion through anybody else should be brought to record. That is absent. Therefore, the appellant should succeed and the order of the authority below is set aside.

[Dictated & Pronounced in the open Court].

(D.N.PANDA)
JUDICIAL MEMBER

Anita