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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/482 /2009 – SM[BR] WITH E / CO/ 90 / 2009-SM[BR] Date **02/02/2011**

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

To :
C.C.E. LUCKNOW
7-A, ASHOK MARG, LUCKNOW.

C.C.E. LUCKNOW Appellant

Vs

M/S ASSOCIATED PIGMENTS LTD. Respondent

I am directed to transmit herewith a certified copy of **Final order No. 96 / 2011 - SM[BR]** dated 27.1.2011 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 ASSOCIATED PIGMENTS LTD.
B-4, 5 UPSIDC, INDUSTRIAL
AREA, MALWAN,
DISTRICT-FATEHPUR.
2. Adv. / Consult SHRI S. SUNIL ADV.
46, BANK ENCLAVE ,DELHI-110092.

3. C.D.R
4. Bar association, CESTAT, New Delhi
5. Director Publications, Customs, Excise. I.P. Estate, New
6. M/s Centax Publictions Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi -
7. Company Law Institute of India Pvt Ltd.,No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
8. M/s. Deeparchie Publications, M-93, Marg. 46, Saket, New Delhi 110017
9. Taxmann Allied Service Pvt Ltd., 59/32, New Rohtak Road, New Delhi -
10. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road, Ahmedabad-15
11. LAWCRUX Advisors Pvt Ltd, LAW House,1-8,Sector - 10, Faridabad 121003 (Haryana)
12. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
13. Office Copy
14. Guard file

Assistant Registrar
(SM Appeal Branch)

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

Excise Appeal No.E/482/2009 with
Excise Cross Objection No.E/90/2009

Date of Hearing: 27.01.2011
Date of Decision: 27.01.2011

(Arising out of Order-in-Appeal No.194-195/CE/LKO/08 dt.26.11.2008 passed by the CCE (A), Lucknow)

For approval and signature:
Hon'ble Mr.M.Veeraiyan 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?	No
2	Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	NO
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?	NO

CCE, Lucknow — Appellant

Vs.

M/s.Associated Pigments Ltd. — Respondent

Present for the Appellant: Shri K.P.Singh, SDR
Present for the Respondent: Shri S.Sunil, Advocate

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

Final **ORDER NO.** 96/2011 SM (BR)

PER: M.VEERAIYAN

The appeal No.E/482/09 is by the department against the order of the Commissioner (Appeals) No.194-195/CE/LKO/08 dt.26.11.2008. The cross objection No.E/90/09-SM is connected to this appeal which is basically in support of the order of the Commissioner (Appeals).

2. Heard both sides.

3. The department is in appeal on the ground that the Commissioner (Appeals) has reduced the penalty from Rs.1,12,246/- to Rs.25,000/- after ignoring the provisions of Rule 15 (2) of Cenvat Credit Rules, 2004 and the provisions of Rule 25 of Central Excise Rules, 2002 read with Section 11AC of Central Excise Act, 1944.

4.1 Learned SDR submits that in respect of Rs.19,961/- relating to clearance of finished goods without accounting and without payment of duty which stands admitted, the Commissioner (Appeals) erred in not imposing penalty equal to duty evaded. This is in violation of Rule 25 of Central Excise Rules, 2002 read with Section 11AC. He also submits that Rule 25 derives its spirit from the provision of Section 11AC of the Act and therefore amount equal to duty evaded should have been imposed as penalty.

4.2. In respect of clearance of inputs as such on payment only CVD and education cess and without payment of SAD, he submits that the penalty imposed by the original authority amounting to Rs.92,285/- should have been sustained in the light of the provision of Rule 15 (2) of Cenvat Credit Rules, 2004 read with Section 11AC.

5. Learned Advocate strongly supports the order of the Commissioner (Appeals). He also draws my attention to the decision of the Hon'ble High Court of Delhi in the case of M/s.K.P.Pouches Pvt.Ltd. reported in 2008 (228) ELT 31 (Del.) and submits that in respect of clearance of finished goods on which the duty involved amounting to Rs.19,961/- stands paid before issue of show cause notice, option to pay concessional

penalty in terms of Section 11AC should have been extended by the original authority and in which case the penalty imposable was only Rs.4,990.25.

6. Regarding clearance of inputs as such, they were cleared after accounting and after paying the amount equal to CVD and education cess which was taken as credit and it is by mistake and oversight that the SAD portion was not paid back. It is not a case of intentional evasion of duty and therefore there is no justification for equal amount as penalty as claimed by the department.

7. I have carefully considered the submissions from both sides and perused the records, As regards penalty of Rs.19,961/-, it is a clear case of admitted clandestine removal followed by payment of duty involved and therefore the provisions of Section 11AC are clearly attracted. However, as duty stands paid before issue of show cause notice, an option should have been extended to the assessee to pay concessional penalty of 25%.

8. As regards clearance of inputs as such, after reversal of the credit of CVD and education cess, the submissions on behalf of the respondents that it was, by mistake, that they have failed to reverse SAD component appears bonafide and the same has been rightly accepted by the Commissioner (Appeals). This omission does not warrant penalty of amount equal to duty involved in terms of Rule 15(2) of Cenvat Credit Rules, 2004 read with Section 11AC of Central Excise Act, 1944.

9. The ground of appeal seeks relief in terms of Rule 25 of Central Excise Rules, 2002 read with Section 11AC. That the

Rule 25 is subject to the provision of section 11AC implies that the penalty imposed under Rule 25 can never exceed the duty evaded which is the prescribed penalty under provisions of section 11AC. Rule 25 does not envisage that the penalty should be always equal to the duty short levied or short paid or evaded and discretion is inbuilt under Rule 25. Therefore, the grounds of appeal which seeks invokation of Rule 25 do not justify penalty equal to duty evaded, as sought to be canvassed by the learned SDR.

10. In the overall facts and circumstances of the case, the Commissioner (Appeals) reducing the penalty from Rs.1,12,246/- to Rs.25,000/- is justified and the same calls for no interference.

11. The appeal by the department is rejected. The cross objection is also disposed of.

(Pronounced in the open court)

(M.VEERAIYAN)
MEMBER (TECHNICAL)

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