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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066

EXCISE APPEAL BRANCH

Appeal No. E/1858 & 2035/2010 - EX[DB] WITH E/S/1836 & 1941/2010-EX   Date 06/04/2011

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

To :
SH. ASHWANI DEEWAN, MANAGING DIRECTOR
M/S C.T.COTTON YARN LIMITED (100% EOU), DELHI
BLUE APARTMENT, 2, FACTORY ROAD,
SAFDARJUNG RING ROAD, NEW DELHI.   Appellant
SH. ASHWANI DEEWAN, MANAGING DIRECTOR

Vs

STAY ORDER NO.428-429/2011-EX   Respondent

C.C.E. INDORE

I am directed to transmit herewith a certified copy of **Final order No.323-324/ 2011 EX[DB]** dated 25-3-11 passed by the Tribunal under **Section 35-C(1)of Central Excises Act, 1944**

Assistant Registrar
(Excise Appeal Branch)

Copy to :

1. Respondent
C.C.E. INDORE
MANIK BAGH PALACE, POST
BOX NO. 10, INDORE 452001 (M.P.)

2. Adv. / Consult
MR.JAGMOHAN BANSAL
1640/1,SECTOR-40B,CHANDIGARH

3. C.D.R
4. Bar association. CESTAT, New Delhi
5. Director Publications, Customs, Excise, I.P. Estate, New Delhi
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 - 110005
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
15. HON'BLE PRESIDENT.
16. SH. MAHENDRA SHARMA, 25-B, INDL. AREA, MALANPUR, DISTT. BHIND (MP)

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
West Block No.2, R. K. Puram, New Delhi.
Court No. 1

Date of hearing/decision: 25.03.2011

Excise Stay No. 1836 of 2010 in Excise Appeal No. 1858 of 2010

Sh. Ashwini Deewan, Managing Director of M/s C.T. Cotton Yarn Limited — Appellants

Vs.

CCE, Indore — Respondent

AND

Excise Stay No. 1941 of 2010 in Excise Appeal No. 2035 of 2010

Sh. Mahendra Sharma — Appellants

Vs.

CCE, Indore — Respondent

Appearance:

Rep. by Sh. Jagmohan Bansal, Advocate for the appellants.
Rep. by Sh. V. Chaudhary & Sh. I. Baig, DRs for the respondent.

Coram: Hon'ble Sh. Justice R.M.S. Khandeparkar, President
Hon'ble Sh. Rakesh Kumar, Member (Technical)

STAY ORAL ORDER NO. 428-429/2011-SB

Per: Shri Justice R.M.S. Khandeparkar:

Heard the learned Advocate for the appellants and the DR for the respondent.

2. As we propose to dispose of the appeal itself, the application is allowed without insisting for any pre-deposit with direction to the Registry to place the appeal for final hearing forthwith for disposal. Application stands disposed of accordingly.

(Justice R.M.S. Khandeparkar)
President

(Rakesh Kumar)
Member (Technical)

Pant

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

Date of Hearing/Decision: 25.03.2011

For approval and signature:

Hon'ble Shri Justice R.M.S. Khandeparkar, President
Hon'ble Shri 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 should 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 Departmental authorities?	

Excise Appeal No. 1858 of 2010

[Arising out of order in original No. 08/Commr/Cex/IND/2010 dated 31.03.2010 passed by the Commissioner, Customs & Central Excise, Indore].

Sh. Ashwani Deewan, Managing Director of M/s C.T. Cotton Yarn Limited — Appellants

Vs.

CCE, Indore — Respondent

AND

Excise Appeal No. 2035 of 2010

[Arising out of order in original No. 08/Commr/Cex/IND/2010 dated 31.03.2010 passed by the Commissioner, Customs & Central Excise, Indore].

Sh. Mahendra Sharma — Appellants

Vs.

CCE, Indore — Respondent

Appearance:

Rep. by Sh. Jagmohan Bansal, Advocate for the appellants.
Rep. by Sh. V. Chaudhary & Sh. I. Baig, DRs for the respondent.

Coram: **Hon'ble Sh. Justice R.M.S. Khandeparkar, President**
Hon'ble Sh. Rakesh Kumar, Member (Technical)

FINAL ORAL ORDER NO. 323-324 / 2011-EX.

Per: Shri Justice R.M.S. Khandeparkar:

These appeals are being heard in terms of order passed today in the stay applications Nos. 1836 & 1941 of 2010.

2. Since the common questions of law and facts arise in both the appeals they were heard together and are being disposed of by this common order.

3. Both the appeals arise from common order dated 31.03.2010 passed by the Commissioner, Indore. By the impugned order, the duty demand of Rs. 1240084/- has been confirmed against the company alongwith imposition of penalty of Rs. 60 lakhs under Rule 26 of the Central Excise Rules, 2002 and Rs. 30 lakhs under Section 112 of the Customs Act, 1962 against the appellant Shri Ashwani Deewan and penalty of Rs. 6 lakhs under Rule 26 of the said Rules and Rs. 3 lakhs under Section 112 of the said Act against the appellant Shri Mahendra Sharma. These appeals are confined the challenge to the penalty imposed against the appellants herein.

4. Learned Advocate for the appellants submitted that under order dated 11.11.2008, the Tribunal had remanded the matter to the Commissioner to deal the levy of penalty against the appellants afresh and accordingly the impugned order came to be passed. However, the authority imposed the

penalty ignoring the basic requirement of provisions of Rule 26 of the said Rules as well as that of Section 112 of the said Act inasmuch as that both the provisions of law in order to exercise the powers thereunder and to impose the penalty require that the goods in respect of the person held responsible for having dealt with the goods should be confiscable and undisputedly in the case in hand, the goods were neither ordered to be confiscated nor there was any finding arrived at by the authority that the goods were liable for confiscation and, therefore, the authority could not have imposed penalty against the appellants. He further submitted that without prejudice to this contention, the appellants pray that in view of admission of the default on their part in the matter and 100% penalty amount having been imposed against the company, a lenient view be taken in the matter as far as the quantification of penalty against the appellants is concerned.

5. The DR on the other hand submitted that question of confiscation of the goods did not arise in the matter as the goods in question were already sold by the company and were not available besides the impugned order in para 29 and 30 elaborately discusses the reasons for imposition and quantification of penalty. He further submitted that the matter was undoubtedly remanded to the Commissioner to deal with the aspect of penalty afresh. However, as to whether the penalty can be imposed or not in terms of Rule 26 of the said Rules and under Section 112 of the said Act was never under challenge before the Tribunal in the earlier proceedings. If at all, the appellants wanted to challenge the said aspect, they should have raised the said point in first round of litigation itself and it is not open for the appellants to raise the said issue at this stage. Besides, in the original order,

there is already finding that the goods were liable for confiscation. Besides the penalty has been reduced from Rs. 1 crore to Rs. 60 lakhs under Rule 26 of the Central Excise Rules and from Rs. 50 lakhs to Rs. 30 lakhs in respect of Shri Ashwani Deewan.

6. The dispute in the matter is restricted to the penalty aspect in terms of Rule 26 of the said Rules and Section 112 of the said Act. Rule 26 (1) of the said rules provides that any person who acquires possession of, or is in any way concerned in transporting, removing, depositing, keeping, concealing, selling or purchasing, or in any other manner deals with, any excisable goods which he knows or has reason to believe are liable to be confiscated under the Act or the Rules made thereunder, then the penalty not exceeding the duty on such goods or Rs. 2,000/- whichever is greater can be imposed.

7. Section 112 of the said Act, deals with the subject of penalty on improper importation of goods etc. It provides that any person, who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under Section 111, or abets the doing or omission of such act, or who acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing or in other manner dealing with any goods which he knows or has reason to believe are liable to confiscation under Section 111 shall be liable to various penalties as specified in different circumstances as described under the said provision of law.

8. Evidently, therefore, whether it is under Rule 26 of the said Rules or under Section 112 of the said Act, a person for having dealt with any goods in any manner can be made liable to pay the penalty as prescribed provided the goods are either excisable goods or the contravened goods and such person knows or has reason to believe that such goods are liable to confiscation under the statutory provisions comprised under the Excise Act or the Customs Act respectively. The basic requirement is that the person dealing with the goods who has either the knowledge or has reason to believe that such goods are liable to confiscation under either of the Acts. The requirement is not that the goods should be ordered to be confiscated. The requirement merely deals with the knowledge or the reason to believe which the person dealing with such goods must entertain in relation to the fact that the goods are liable to confiscation. Being so, absence of finding about the goods being liable to be confiscated cannot be a justification to say that the person cannot be penalised under either the said provisions of law. Undoubtedly, however, it would be necessary to ascertain whether the authority has found that the person had knowledge or had reason to believe that the goods are liable to confiscation or not.

9. Perusal of order dated 8.07.2008 discloses that, there was the order passed by the adjudicating authority which was under challenge before the Tribunal in Excise Appeal Nos. 2028 and 2029 of 2008 which were disposed of under order dated 11.11.2008 and in para 46 and 47 thereof it was clearly recorded that "it is, therefore, evident that Shri Ashwani Kumar had knowingly deal with the exciseable goods which he has reason to believe were liable to confiscation in terms of the provisions contained in the

Central Excise Act, 1944 and the Rules made thereunder. By doing so, Shri Ashwani Kumar the assessee No. 2 has rendered himself liable to penal action in terms of Rule 26 of the Central Excise Act, 1944. Shri Ashwani Deewan was also responsible for diversion /sale of duty free imported SKO/HSD and for not using the same in the factory premises for intended purpose. By doing so, Shri Ashwani Deewan also rendered himself liable for penal action under Section 112 of the Customs Act, 1962 for his active role in evasion of duty of customs as well by the assessee No. 1".

10. In relation to the appellants Shri Mahendra Sharma in para 47 it was held that "Shri Mahendra Sharma had knowingly deal with the exciseable goods which he has reason to believe that the same had been cleared in contravention of the Central Excise Act, 1944 and were liable to confiscation in terms of the provisions contained in the Central Excise Act, 1944 and the Rules made thereunder. He added and abetted and also acted in all the act of evasion by the assessee No. 1 and No. 2. By his above mentioned act Shri Mahendra Sharma the assessee No. 3 has also rendered himself liable to penal action in terms of Rule 26 of the Central Excise Rules, 2002. Shri Mahendra Sharma was also responsible for diversion /sale of duty free imported SKO/HSD and for not using the same in the factory premises for intended purpose. By doing so, Shri Mahendra Sharma also rendered himself liable for penal action under Section 112 of the Customs Act, 1962 for his active role in evasion of duty of customs as well by the assessee No. 1".

11. Apparently, therefore, the authority had clearly arrived at the basic findings required to sustain the decision in relation to penal liability of the appellants. Undisputedly, the same findings were not disturbed by the Tribunal in the order dated 11.11.2008. While remanding the matter, it was essentially remanded on the point of quantification of the penalty. This is apparent from para 8, 9 and 10 of the said order dated 11.11.2008 which read thus:-

> "8. This is a consequential appeal which arose out of Appeal case No. 1982 of 08. In view of certain findings, the learned assessing authority imposed penalty of Rs. 1,00,00,000/- (Rupees one crore only) under Rule 26 of Central Excise Rules, 2002 on the appellant in this appeal. Similarly, learned Assessing Authority has also imposed penalty of Rs. 50,00,000/- (Rupees fifty lakhs only) under Section 112 of Customs Act, 1962.
>
> 9. The appellant pleads that penalties imposed were severe and when the appellant is sick financially and facing recovery proceeding before financial institutions, levy of deterrent penalty would be harsh since the Appellant admits duty liabilities to the extent aforesaid in appeal case No. 1982/2008. Learned counsel prays that penalty levied may be reconsidered in denovo proceeding when the matter goes back for deciding double taxation issue. In view of such pleadings, learned Adjudicating authority may reconsider the quantum aspect afresh in this appeal.
>
> 10. In view of our aforesaid observations and conclusion, dispensing pre-deposit, in this case also, appeal has been disposed in the manner indicated above remanding back the matter to the learned adjudicating authority for fresh adjudication in respect of levy of penalty on this appellant".

12. Once the finding in the earlier order was not challenged by the appellants and the remand was a specific remand in relation to the quantification of the penalty as rightly pointed out by the DR, it is too late for the appellants to contend that the authority could not have imposed the penalty under the said provisions of law on the above mentioned ground. Even otherwise as already seen above, the clear finding arrived at regarding the penal liability even in the impugned order clearly justifies the action under Rule 26 of the said Rules and under Section 112 of the said Act. In the impugned order, the Commissioner has clearly held thus:

> "29. Shri Ashwani Deewan, A Chartered Accountant by Profession, was the Managing Director of the company. He had taken the Management control of the noticee from its earlier management w.e.f. 28.09.01. He appointed Sh. Mahendra Sharma to look after all the works related to purchase of raw material, ale of finished goods, procurement of duty free goods etc. During the search operation at M/s C.T. Cotton two note books were recovered from his possession found to be maintained by him only in his own handwriting. He had engineered the modus operandi for evasion of duty with the help of Sh. Mahendra Sharma who as per his direction manipulated all documents, even forged the official documents, signature & seal of Central Excise Officials. Investigation revealed that Sh. Deewan had created two firms viz M/s ADB Trade Services and M/s Jas Expoship P. Ltd. both owned & managed by him only. In order to circumvent the law & to siphon off the sale proceeds generated out of clandestinely cleared goods, he managed to receive the payments through above named companies. He had been managing the funds, at his own will, between M/s ADB Trade, M/s Jas Expoship & M/s C.T. Cotton Yarn Ltd. Investigation also revealed that noticee No. 1 procured duty free imported HSD/SKO. The entire quantity of such duty free imported material was not brought into the factory premises

but sold in open market without payment of appropriate duties of customs, without issue of invoice & without accounting in the statutory records. All these activities were done on the direction of Shri Deewan.

30. Sh. Ramesh Nair, Advocate on behalf of noticee No. 2 has submitted reply dated 11.05.09 that there was no evidence or any finding which shows that noticee No. 2 was in the knowledge of the clearances of goods. In this regard it has been brought on record that noticee No. 2 was himself maintaining ledger for clearances of goods in his own handwriting regularly for the past 3-4 years. He had maintained two separate companies in the same premises to receive sale proceeds if received through cheque/DD /etc. or paid by the buyer in above manner. Malafide intention of Shri Deewan also gets support from the fact that soon after the raid was conducted by the officers of DGCEI, he reportedly left India & did not respond to summons issued to him. It has been also submitted in reply dated 11.05.2009 that penalty under Rule 26 is not imposable on the noticee No. 2 as he was neither involved in any activity at the factory nor involved indirectly. In this matter it is to mention here with Sh. Deewan had appointed Sh. Mahendra Sharma and given direction to do all the activities as alleged in show cause notice".

13. It is also apparent from the records that originally appellants Sh. Ashwani Deewan was subjected to the penalty of Rs. 1 crore under Rule 26 and Rs. 50 lakhs under Section 112. The same has been now reduced to Rs. 60 lakhs and Rs. 30 lakhs respectively. As regards Sh. Mahendra Sharma, earlier the penalty which was imposed Rs. 10 lakhs under Rule 26 and Rs. 5 lakhs under Section 112 and the same has been reduced to Rs. 6 lakhs and Rs. 3 lakhs respectively. Being so, the authority taking into consideration

requantified the penalty amount lesser than what was imposed under the earlier order.

14. Though, it is sought to be contended that 100% penalty was imposed against the company, it has been brought to our notice that the company has failed to pay the said amount. Besides, the findings arrived at by the Commissioner in para 29 and 30 which are quoted hereinabove hardly makes out a case for any lenient view in the matter. Taking into consideration the active participation by the appellants in the clandestine removal of the goods with the intention to evade payment of duty which has been clearly established, we do not find this being a fit case to show any leniency in the matter. Request for lenient view in that regard, therefore, deserves no consideration.

15. For the reasons stated above, therefore, the appeals fail and are hereby dismissed.

(Justice R.M.S. Khandeparkar)
President

(Rakesh Kumar)
Member (Technical)

Pant