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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/548 /2006-549 /2006 - EX[DB] Date **19/05/2011**

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

To :
BHURJI SUPER-TEK INDUSTRIES LTD.
272,UDYOG VIHAR, PHASE-II GURGAON
122001

BHURJI SUPER-TEK INDUSTRIES LTD. Appellant
Vs
C.C.E. DELHI III Respondent

I am directed to transmit herewith a certified copy of **Final order No.432-433/ 2011 EX[DB]** dated 18-5-11 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. DELHI III
UDYOG MINAR, UDYOG VIHAR,
VANIJYA NIKUNJ, PHASE V,
GURGAON - 122016 (HARYANA)

122001
2. Adv. / Consult SH. T. R. RUSTAGI, ADV., SD-84, TOWER APARTMENTS, PITAMPURA, DELHI-34
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. Taxmann Allied Service Pvt Ltd., 59/32. New Rohtak Road. New Delhi - 110005
9. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road, Ahmedabad-15
10. LAWCRUX Advisors Pvt Ltd. LAW House.1-8.Sector - 10. Faridabad 121003 (Haryana)
11. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
12. Office Copy
13. Guard file

ASSISTANT REGISTRAR
(EX. APPEAL BRANCH)

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

Date of Hearing: 03.05.2011 & 04.05.2011

Excise Appeal No.E/548-549/2006
[Arising out of order in-appeal No.437-438/GRM/GGN/05 dated 30.11.2005 passed by the Commissioner of Central Excise (Appeals), Gurgaon].

Bhurji Super-Tek Industries Ltd. ...Appellant

Vs.

CCE, Delhi ... Respondent

Present for the Appellant : Shri T.R. Rastogi, Advocate
Present for the Respondent : Ms. Monica, DR

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

FINAL **ORDER NO.** 432-433/2011 **DATED: 04.05.2011**

PER: D.N.PANDA

These two appeals arose out of common order in appeal No. 437-438/GRM/GGN/05 dated 30.11.2005 dealing with show cause notices dated 5.3.2002 and dated 18.10.2002. The first show cause notice proposed a demand of Rs.3,88,401/- for the period 1996-97 to 2000-01 and the second show cause notice proposed demand of Rs.1,71,904/- for the period from April 2001 to August, 2002. Both the show cause notices raised the issue as to whether free supplied moulds shall be subject to amortisation for determining assessable value.

2. The appellant by letter dated 11.6.01 informed the authorities below that w.e.f. 1.2.2000 cost of moulds was amortised (reference page 25 of appeal folder) and the manner of amortisation was explained by cost sheet (reference page 27 of the appeal folder). But the show cause notice alleged that before and after amortisation, assessable value of goods remained the same. Audit made during 18.4.2002, 20th April, 2000, had also pointed out that assessable value did not comprise amortisation cost and visit by the departmental officers on 12.3.01 (by which date the assessee had followed the amortisation procedure) also resulted with the reporting of undervaluation of assessable value.

3. Ld. Counsel appearing on behalf of appellant submitted that so far as the first show cause notice relating to the period 1996-97 to 2000-2001 is concerned, the demand in question proposed by show cause notice was discharged in two parts. First 50% was paid on 15.2.2000 and the rest of the amount was paid on 11.7.2000. The discharge so made was two years before issuance of the show cause notice (SCN issued on 5.3.2002). He categorically submitted that this amortisation issue was in debatable stage before various forums during different periods till that was resolved by Larger Bench in the case of Mutual Industries Ltd. vs. Collector of Central Excise, Mumbai reported in 2000 (117) ELT 578 (Tri.) Law was laid down

stating that amortisation cost of the moulds shall form part of the assessable value. When the law was settled, the appellant immediately on 11.6.01 informed the department by its letter (reference page 25 of the appeal folder) that it had discharged the duty liability arose upon amortisation.

4. So far as the second show cause notice is concerned, ld. Counsel submitted that because of the confusion of the law, it was not practicable for the appellant to include cost of amortisation in assessable value to discharge its liability from April 2001 to August, 2002, for which show cause notice dated 18.10.2002 was issued. He relied on the decision of Nizam Sugar Ltd. delivered by Apex Court 2008 (9) STR 314 (S.C.) to submit that when the things were within the knowledge of the Department and the law was in debatable stage, the case of suppression of the assessable value does not arise. He therefore, prayed that no penalty may be levied for both the periods covered by different show cause notices.

5. While arguing on the merits as above, his categorical submission is that both the cases suffer from time bar because the facts were within the knowledge of the Department as early as 11.6.01

6. Ld. DR on behalf of the department submitted that in terms of show cause notice, the assessee was well exposed of the fact that before and after amortisation, assessable value

remained the same and that is very clear from paragraph 8 of the show cause notice appearing at page 3 thereof. Such a conclusion was drawn by the Department upon scrutiny of invoices. When the appellant was aware that the moulds were necessary for manufacture, cost thereof should have been included in the assessable value. But when the assessable value was deflated, revenue was prejudiced for which penalty is imposable.

7. Heard both sides and perused the records.

8. We have heard the matter in length yesterday. When the assessee came forward to discharge the tax liability soon after the audit was conducted by Department during the period 18th April 2000 to 20th April 2000 we required both sides to clarify whether the case shall fall under sub-section (2B) of section 11A of the Central Excise Act 1944. But today we were explained by Shri Rastogi Ld. Counsel that the benefit provision contained in Section 11 A(2B) came into force w.e.f. 11.5.01 for which the period comprised in first SCN is out of scope of that section. This provision was applicable to the second show cause notice. So far as the first part of the demand covered by first show cause notice is concerned, the assessee discharged its liability in toto by 11.7.2000 while SCN was issued on 5.3.2002 in consequence of audit finding during

18.4.2000 to 20.4.2000 while law was in debatable stage and on 11.6.2001 informed the Authority about amortisation. Therefore there is scope to appreciate that the adjudication in respect of that show cause notice is time barred.

9. The second show cause notice pertained to period April 2001 to August, 2002. Looking to the date chart given by Shri Rastogi and looking to the legislative intent of section 11A (2B), we are of the view that the case in so far as second show cause notice is concerned, that partially attracts the case of the appellant. But assessee has failed to discharge the duty demand of Rs.1,71,904/-. Thus, the assessee handicapped itself to get the immunity under section 11A (2B) of Central Excise Act, 1944.

10. Motive of the assessee invited attention in respect of levy of penalty while the assessee came forward to discharge its tax liability soon after the audit observations were made during 18.4.2000 to 20.04.2000 for the first period in two instalments i.e., partly on 15.2.2000 and partly on 11.7.2000 while first show cause notice was issued on 5.3.2002. But before show cause notice was issued, the assessee informed the Department about its intention on 11.6.2001. We appreciate ld. DR's contention that the cost aspect of the goods appears to be same before and after amortisation. But The show cause notice does not demonstrate any cost analysis to show

how such inference was drawn to level charge. Show cause notice fails to provide basis for defence for which there is no scope to appreciate that the assessee had manipulated assessable value. Therefore, there is no scope to doubt ill motive of the assessee at all. Accordingly, there is also no scope to penalise the assessee in respect of the show cause notice issued for the period 1996-97 to 2000-2001. Thus the appeal of assessee against penalty imposed by first show cause notice succeeds.

11. Having been found that the case of the assessee does not attract section 11A (2B) of Central Excise Act, 1944, the second show cause notice attracted 11AC of the Central Excise Act 1944 since duty demand for the period April 2001 to August 2002 is required to be confirmed by the ratio laid down by Larger Bench in the case cited by Ld. Counsel. Section 11AC has provided concessional penalty, if an assessee comes forward to discharge its duty liability including interest within stipulated period, provided an option in this respect is given to ~~its~~ Assessee. In the case of K.P. Pouches (P) Ltd. vs. Union of India reported in 2008 (228) ELT 31 (Del.) Hon'ble High Court of Delhi has appreciated genuine difficulties and laid down that option should be patent from adjudication order and in para 27 of the judgement held as under:-

> *27. 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."

Similar view as held in K.P. Pouches was also expressed in the case of Commissioner of Central Excise & Customs vs. Rama Synsilk Mills P. Ltd. reported in 2010 (254) ELT 277 (Guj.)

12. On the aforesaid factual and legal premises, we have no hesitation to hold that the assessee is liable to penalty for the period April 2001 to August, 2002 while there shall be no penalty for the period 1995-96 to Dec. 1999. The assessee shall not be deprived of the benefit of concessional penalty in view of statutory provision enacted in section 11AC read with the judicial pronouncement made in K.P. Pouches case. Accordingly we hold that there shall be no penalty against duty demand of Rs.3,88,401/-, relating to first period i.e. 1996-97 to 2000-01 and there shall be concessional penalty for the second period subject to fulfilment of the conditions in section 11AC read with the decision of Hon'ble High Court of Delhi in

K.P. Pouches case and subject to verification of challans of deposit of the duty demand made by adjudication.

13. In the result, the appellant gets partial relief and the appeal is partly allowed to the extent indicated above.

[Dictated & Pronounced in the open Court].

(D.N.PANDA)
JUDICIAL MEMBER

(MATHEW JOHN)
TECHNICAL MEMBER

Anita