IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI
COURT No. I

APPEAL Nos. E/493-495/2010

(Arising out of Order-in-Appeal No. SB/01 to 03/Th-II/2010 dated 4.1.2010 passed by Commissioner of Central Excise (Appeals), Thane-II)

Iftikhar Ahmed **Appellants**
Neelam Prints
Neelam Prints

Vs.

Commissioner of Central Excise, Thane-II **Respondent**

Appearance:

Shri Iftikhar Ahmed, in person, for appellant
Shri S.J. Sahu, Assistant Commissioner (AR), for respondent

CORAM:

Hon'ble Mr. Ramesh Nair, Member (Judicial)
Hon'ble Mr. Raju, Member (Technical)

Date of Hearing: 16.4.2018
Date of Decision: 28.6.2018

ORDER No. A/**86849-86851/2018**

Per: Ramesh Nair

The Brief facts of the case are that Appellant M/s. Neelam Prints is engaged in the printing of Man Made Fabric falling under chapter 54 of the Central Excise Tariff Act, 1985. Shri Iftikhar Ahmed is Proprietor of said M/s Neelam Prints. The preventive staff of central excise searched the premises of the Appellant unit on

20.03.2004 and found 191 printed polyester sarees, certain stock of colour pigments binder, one power operated stirrer attached to 1HP Motor hung on simple chain, Pulse Polio printed banners on cotton fabrics. The officers detained the said sarees and the stirrer for further investigations and handed over to the appellant for safe custody. The Show Cause Notice dated 15.09.2004 was issued to the Appellant proposing to confiscate 191 sarees totally valued at Rs.17,191/- under Rule 25 of CER, 2002 and to impose penalty under Rule 25 of CER,2002. Another show cause notice dt. 17.02.2006 was issued proposing to demand central excise duty of Rs. 1,70,108/- on the MMF fabrics printed and cleared during the period from 01.03.2003 to 30.11.2003 under Section 11A(1) of CEA,1944 along with interest and proposing to impose penalty under Section 11AC of CEA,1944 and under Rule 25 and/or 26 of CER,2002. It was contended that Shri Jagat Narayan, Colour Master working with the Appellant in his statement recorded on 20.03.2004 had admitted that they are using stirrer with the help of electric power for preparation of colour paste which is used for printing. However vide his letter dated 01.04.2004 he informed that on 20.03 2004 he had stated that he is mixing colour with his hand but he used stirrer for mixing colour for Pulse Polio Banners only. That his statement was recorded by threatening him. Shri Iftikhar Ahmed proprietor in his statement recorded on 17.08.2004 deposed that they are getting water from bore well in the compound which is used for printing. The stirrer is used for mixing pigments for printing cotton banners. That the Appellant have carried out the process of printing MMF falling under Chapter 54 & 55 of CETA, 1985 by using power operated stirrer and lifting water through power operated submersible pump which is an integral part of the process of manufacture of their final product. Therefore the goods manufactured by them are chargeable to duty and not eligible for exemption under Sr. No. 3 of Notification No. 7/2003 dated 01.03.2003.

2. The show cause notice dt. 15.09.2004 was decided by the adjudicating authority vide OIO No. 3848 dated 30.11.2005 whereby he imposed redemption fine of Rs.5000/- in lieu of confiscation of seized goods i.e. 191 polyester Sarees valued at Rs.17,190/-. He also imposed penalty of Rs. 1719/- on M/s Neelam Prints under 25 Rule and penalty of Rs.1719/- on Mr Iftikhar Ahmed, Proprietor under Rule 26.

3. The SCN dated 17.02.2009 was also adjudicated by the original authority vide OIO No. 3936 dated 31.10

2006 confirming duty demand of Rs.1,70,108/- and appropriation of amount of Rs. 1,70,198/- already paid by the Appellant. A penalty of Rs. 1,70,108/- was also imposed on Mr. Iftikhar Ahmed, proprietor.

4. The revenue filed appeal against OIO No. 3848 dt. 30.11.2015 before the Commissioner (Appeals) on the ground that as per Rule 25 of CER, 2002 the assessee shall be liable to penalty not exceeding the duty or Rs 10,000/- whichever is greater. As such the adjudicating authority has no discretion to impose a penalty below Rs.10,000/-. M/s Neelam Prints and Shri Iftikhar Ahmed also filed separate appeals against the said order.

5. The Commissioner (Appeals) vide common Order-in-appeal No.SB/01-03/Th-II/10 dated 04.01.2010 decided all the three appeals i.e Appeal filed by revenue against Order-in-original dt. 30.11.2005 and appeal filed by M/s Neelam and Shri Iftikhar Ahmed against Order in Original dt. 3936. The Commissioner (Appeals) upheld the OIO No. 3936 dated 31.10.2006 thereby rejecting the Appeals filed by M/s Neelam Prints as well as Shri Iftikhar Ahmed, its proprietor. In case of appeal filed by the revenue against Order-in-original No. 3848 dt. 30.11.2005 he allowed the appeal filed by the

revenue by enhancing penalty under rule 25 to Rs.10,000/-. Hence the present appeals before us by M/s Neelam Prints and Shri Iftikhar Ahmed .

6. Shri Iftikhar Ahmed, appearing on behalf of the all the appellants submits that they had got orders for printing banners on cotton base fabrics and therefore the power operated stirrer was used for mixing colour paste for the same for short time. The Panchnama dated 20.03 2004 mentioned that printing of Pulse Polio banners were going on. There is no corroborative evidence to prove that the appellant is using power operated stirrer for printing of MMF. Therefore the exemption under Notification No. 7/2003- CE cannot be denied to them. Further the appellant were doing Job-work and recovering only the processing charges form their customers. No duty was recovered from them. In the circumstances cum-duty benefit may be granted to them. Further there cannot be double penalty on the appellants as well as its proprietor for same cause of action. He also submits copy of OIA No. MI/AV/208/2011 dated 19.04.2011 under which the appeal filed by the appellants against the OIO No. 3848 dated 30.11.2005 was decided and the Commissioner (Appeals) held that considering the facts that the proprietor and the firm are one and the same, the

subsequent imposition of penalty on M/s Neelam Prints was not called for and accordingly set aside. Further as the SCN has been issued after a period of one year hence time barred.

7. Shri S.J. Sahu Ld. AC(AR) appearing on behalf of revenue reiterates the findings of impugned order and supports the same.

8. We have heard both the sides and perused the records. The issue to be decided is as to whether in the facts of the case the appellants were entitled for the exemption under the Notification No.7/22003-CE dated 01.03.2003 and whether the Penalties were imposed correctly against them. We find that Sr.No.3 of the said notification exempts goods specified therein processed without the aid of power or steam, with or without using of machines. There is no explanation has been inserted below Sr.No.3 so as to deem that lifting of water etc and mixing of dyes etc by stirrer the said fabrics have been processed without the aid of power or steam. Thus the units who are engaged in processing or printing of MMF using power operated pumps for lifting water or using power operated stirrer for mixing the dyes are not eligible to claim the exemption under said Notification. It has been observed by the adjudicating as well as

appellate authority that the statement of Shri Jagat Narayan Choubey recorded on 20.03.2004 given in English in his own hand writing voluntarily without any force, coercion or threat and his letter dated 01.04.2004 has been sent after a gap of eleven days and hence after thought. Shri Iftikhar Ahmed Proprietor has also admitted that water has been lifted from the bore well by using submersible pump using power for the purpose of processing the MMF in his unit. It proves that the appellants were using power for processing their products and hence are not eligible for the exemption. Our above view supported by the Tribunal Judgments in case of NEHALI Versus COMMISSIONER OF C. EX. & CUSTOMS, VADODARA-I - 2009 (242) E.L.T. 271 (Tri. - Ahmd.).

9. As regards penalties imposed we hold that considering the facts that the proprietor and the firm are one and the same, the imposition of penalty on M/s Neelam Prints as well as proprietor Shri Iftikhar Ahmed was not called for. Therefore, the penalty of Rs 1,70,108/- imposed on Shri Iftikhar Ahmed under OIO No.3936 dated 31.10.2006 and upheld under impugned OIA is set aside. As regards enhancement of penalty to Rs.10,000/-, we observe that Rule 25 prescribes the maximum amount of penalty which can be imposed and

it is not a mandatory penalty. Therefore, we set aside the impugned OIA to the extent of enhancing the penalty to Rs 10,000/-. The contention of the appellants as regard limitation is not acceptable in the facts of the case. The penalty imposed upon M/s Neelam Prints under Section 11AC being mandatory in nature cannot be reduced and hence we uphold the same.

10. In view of the above, we uphold the OIA as regards confirming the demand of Rs. 1,70,108/- along with interest and imposing penalty under Section 11AC. However the penalty imposed under rule 25 is reduced to Rs. 1719/- from Rs.10,000/-. The impugned order is modified to the above extent. The appeal Nos. E/493&494/2010 are dismissed and Appeal No.E/495/2010 is allowed.

(Pronounced in court on 28.6.2018)

(Raju)	**(Ramesh Nair)**
Member (Technical)	**Member (Judicial)**

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