

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

West Zonal Bench, Ahmedabad

Appeal No. : E/1246-1249/2008, E/697/2009

[Arising out of i) OIA-99-102/2008/AHD-I/CE/ID/COMMR- A dtd 30.6.2008 and ii) OIA-2/2009-AHD-I-CE/ID/COMMR-A-/AHD dtd 07/01/2009 passed by Commissioner of Central Excise-AHMEDABAD-I]

1. M/s Sharp Engineers - Appellant(s)

2. Shri Amitbhai Babubhai Patel

3. Shri Babubhai Joitaram Patel

4. Shri Dhirubhai K Modhwadia

Vs

Commissioner of Central Excise-AHMEDABAD-I Respondent (s)

Represented by

For Assessee : Shri R K Jain, Advocate

For Revenue : Shri T K Sikdar, Authorised Representative

For approval and signature :

Mr. P.K. Das, Hon'ble Member (Judicial)

1. Whether Press Reporter 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 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?

Yes

CORAM :

Mr. P.K. Das, Hon'ble Member (Judicial)

Date of Hearing / Decision : 22/01/2016

ORDER No. A/10054-10058/2016 dtd 22/1/2016

Per : Mr.P.K. Das,

These appeals are arising out of a common order and therefore, all are taken up together for disposal.

2. After hearing both the sides and on perusal of the records, I find that M/s Sharp Engineers (hereinafter referred to as the assessee) a partnership firm was engaged in the manufacture of Lift Winding Machine unit and parts thereof falling under Ch 84 and 85 of the Schedule to the Central Excise Tariff Act 1995. On 7.6.2005 the Central Excise officers visited the factory premises of the assessee and the premises of two other proprietorship firms namely M/s Leo Engineers and M/s Eletech Industries. After examining the records and documents, the Central Excise officers were in the opinion that the clearance value of the other two units would be clubbed with the assessee. They have calculated the demand of duty Rs 13,84,180/- for the period 2004-05. The Ld Advocate submits that in order to avoid legal complexity and further litigation, the assessee paid the entire amount of duty alongwith interest and penalty of 25% of duty, which would be Rs 17,72,800.00. Thereafter, a show cause notice dated 18.12.2007 was issued proposing demand of duty alongwith interest and to impose penalty of equal amount of duty and to impose penalty on the partner of the assessee and the proprietors of the other two units. The Adjudicating Authority confirmed the demand of duty of Rs 13,57,039.00 alongwith interest and imposed penalty of equal amount of duty on the assessee It has also imposed penalty of Rs 50,000/- on Shri Babul Joitaram, partner of the assessee and Rs 40,000/- each on S/Shri Amitbhai Babubhai Patel and Shri Dhirubhai K Modhwadia Proprietor of M/s Leo Engineers and M/s Eletech Industries respectively. By the impugned order, the Commissioner (Appeals) upheld the adjudication order and rejected the appeals filed by the appellants. M/s Sharp Engineers filed two appeals alongwith the appeals of other three appellants before the Tribunal.

3. The Ld. Advocate on behalf of the appellants submits that as they have already paid the entire amount of duty alongwith interest and penalty of 25% of the duty, no Show cause notice should be issued under Section 11A (2B) of the Central Excise Act 1944. He further submits that both the authorities below had not given the option to pay penalty of 25% duty as provided under Section 11AC of the Act. It is submitted that as the penalty was imposed on the partnership firm, no separate penalty can be imposed on the partner as held by the Honble Gujarat High Court in the case of Pravin N Shah vs CESTAT, Ahmedabad - 2014(305)ELT.480 (Guj). It is also contended that the Revenue held that the other units are dummy and therefore no penalty can be imposed on the dummy units. He relied upon the following cases:

1. Umiya Ceramics vs CCE, Rajkot 2007(211)ELT.500 (Tri.Ahmd)
2. CCE, Kanpur vs Auto India 2007(213)ELT.436 (Tri.Del)

4. On the other hand, the Ld Authorised Representative on behalf of the Revenue reiterates the findings of the Commissioner (Appeals). He submits that the Central Excise Officers detected the irregularity and thereafter they have paid the duty and therefore imposition of penalty are justified. He further submits that the penalty was imposed on the proprietors and not the firm, which is a dummy unit and therefore imposition on the individual proprietor are justified.

5. After hearing both the sides and on perusal of the records, I find that the appellants are not contesting the demand of duty alongwith interest and penalty on the assessee. The appellants already paid the entire amount of duty alongwith interest and penalty of 25% of the duty before issuance of the show cause notice. So, the imposition of penalty of equal amount of duty under Section 11AC cannot be sustained. Regarding imposition of penalty on the partner of the partnership firm, I find that the partner of the partnership firm had already paid the duty before issue of the show cause notice in order to avoid legal proceedings. In such situation, imposition of separate penalty on the partner of the firm is not justified. The Honble Gujarat High Court in the case of Pravin N Shah (Supra) held that once partnership firm penalized, separate penalty not imposable upon partner of the firm because the partner is not a separate legal entity. Regarding imposition of penalty on the proprietors of the two dummy units, the main contention of the Ld Authorised Representative for Revenue that penalty was imposed not on the units but on the proprietor. It is well settled that there is no difference between the proprietor and the proprietorship firm. It is held by the Tribunal in the case of M/s Umiya Ceramics (Supra) that the penalty cannot be imposed on the dummy units and therefore Revenue cannot impose the penalty indirectly on the proprietor of the proprietorship firm. Hence imposition of penalty on the said two proprietors of the proprietorship firm cannot be sustained.

6. In view of the above discussion, the impugned order is modified to the extent the demand of duty alongwith interest and penalty on the assessee is upheld. As the assessee already paid penalty 25% of the duty alongwith the entire amount of duty and interest before issuance of show cause notice, they are entitled the option as provided under Section 11AC of the Act 1944 and there is no need to pay the balance amount of penalty subject to verification of deposit of Rs 17,72,000.00, which may be adjusted against the duty. The penalties imposed on the other appellants are set aside. The appeal filed by the assessee disposed of in the above terms. The appeals filed by other appellants are allowed.

(Dictated and pronounced in the Court)

(P.K. Das)

Member (Judicial)