CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
OLD RED BUILDING, 38,M.G.Marg,CIVIL LINES, ALLAHABAD

Dated: 14/12/2015

To

Appellant as per address in table below

Respondent as per address in table below

Final Order No. A/ 70082/2015 dated 30/11/2015

I am directed to transmit herewith a certified copy of order passed by the Tribunal under section 35-C(1) of the Central Excise and Salt Act, 1944.

Asstt. Registrar

Application	Appeal	Name and Address of Appellant
	E/1808/2007	KESARWANI ZARDA BHANDAR SAHSON, ALLAHABAD(UP)

Name and Address of Respondent: CCE ALLAHABAD
38 M.G.MARG, CIVIL LINES
ALLAHABAD.

Other Appellants and Respondents as per Annexure

Copy To

3Advocate(s) / Consultant(s): SH S.P.OJHA, CONST
299, BAGHAMBARI HOUSING
SCHEME, ALLAHAPUR
ALLAHABAD(UP)

4 Bar Association, CESTAT, Delhi
5 Director Publications, Customs, Excise, I.P. Estate, Delhi
6 M/s Centax Publications Pvt. Ltd., 1512-B, Bhishm Pitamah Marg, New Delhi-3
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, Satellite Road, Ahmedabad-15
10 LAWCRUX Advisors Pvt. Ltd., LAW House, 3-8, Sector-10, Faridabad 121003 (Haryana)
11 TaxIndiaOnline.com Pvt. Ltd., 2nd Floor, Vasant Arcade, Vasant Kunj, New Delhi – 110070

12 Mark Professional Services Pvt. Ltd., 108, Everest Block, Aditya Enclave, Hyderabad – 38

13 The ICFAI society, 52, Nagarjuna Hills,Punjagutta Hyderabad.-500082
14 C.D.R. 15 Office Copy 16 Guard File

Asstt. Registrar
Regional Bench, Allahabad

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
CIRCUIT BENCH AT ALLAHABAD

APPEAL No. E/1808/2007-EX[DB]

(Arising out of Order-in-Appeal No. 99/CE/Alld/2007 dated 17.5.2007 passed by Commissioner of Central Excise (Appeals), Allahabad)

For approval and signature:

Hon'ble Mr. P.S. Pruthi, Member (Technical)
and
Hon'ble Mr. S.S. Garg, Member (Judicial) SSGarg

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?	:	
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

Kesarwani Zarda Bhandar **Appellant**

Vs.

Commissioner of Central Excise, Allahabad **Respondent**

Appearance:

Shri S.P. Ojha, Consultant, for appellant
Shri Rajeev Ranjan, AR, for respondent

CORAM:

Hon'ble Mr. P.S. Pruthi, Member (Technical)
Hon'ble Mr. S.S. Garg, Member (Judicial)

Date of Hearing: 18.9.2015
Date of Decision: 30.11.2015

Final ORDER NO. 70082/2015

Per: S.S. Garg

This appeal is directed against order-in-appeal passed by the Commissioner (Appeals) vide order dated 17.5.2007 upholding the decision of the adjudicating authority.

2. Briefly the facts of the case are that the appellant is engaged in the manufacture of branded chewing tobacco falling under sub-heading No. 2403 99 10 of the First Schedule to the Central Excise Tariff Act, 1985 and is availing cenvat credit to the extent of specified duty paid on inputs as prescribed under the Cenvat Credit Rules, 2004. On 6.12.2005, a show cause notice demanding duty of Rs.2,19,127/- was issued to the appellant on the basis of search conducted in the premises of the appellant. During the search on 2.12.2004, the officials of the department found shortage of 3717 kg. of raw tobacco and 2793 kg. of coloured tobacco and 3717 kg. of raw tobacco was allegedly converted into coloured tobacco which was not recorded in stock and 2793 kg. coloured tobacco found short was unaccounted and it appears that the same has been removed without accountal of the same in record and without payment of central excise duty. In this manner, the appellant has allegedly contravened the provisions of Rules 4, 6, 10, 11 and 12 of the Central Excise Rules, 2002. In reply to the show cause notice, the manager of the appellant, Shri Onkār Nath Gupta,

Ssgarg

in his statement recorded by the officers of the department, explained the reasons for the shortages as manifested on the record. Thereafter the Deputy Commissioner vide order-in-original dated 19.12.2006 confirmed the demand of Rs.2,19,127/- under proviso to Section 11A(2) of the Central Excise Act and also imposed a penalty of equal amount under Section 11AC along with interest.

3. The appellant filed appeal before the Commissioner (Appeals) who vide his order-in-appeal dated 17.5.2007 upheld the decision of the Deputy Commissioner and now the appellant is before us by way of the present appeal.

4. The learned counsel for the appellant submitted that there was no shortage of raw tobacco and coloured tobacco which is manifested on record as the alleged shortage has been explained by the manager, Shri Onkar Nath Gupta. The learned counsel further submitted that Rule 10 of the Central Excise Rules, 2002 does not require an assessee to make as many entries as there are transactions. He also submitted that charge of clandestine removal is based on mere presumptions and assumptions and moreover, the shortage was explained on the spot with verifiable facts and raw tobacco and coloured tobacco issued for manufacture were effectively available for verification. The learned counsel further submitted that the entire demand is barred by limitation. He further submitted that as per Rule 10 of the

Cenvat Credit Rules, 2004, the appellant is maintaining daily stock account in respect of their final products. They are also maintaining issue slips i.e. chits in respect of cenvatable inputs issued for manufacture of final products. A copy of declaration under Rule 22(2) of the Rules is annexed by the appellant. All records are maintained on daily basis at the close of the day. Further, the Rules do not require that every time there is an issue of raw material, it should be recorded in statutory records. There is no provision under the law to issue slips for raw tobacco on which no cenvat credit has been taken. The learned counsel explained the process of manufacture of final product step by step. The first step is colouring of tobacco with raw kimam, glazing and spices. Another step is mixing of perfumery compound with coloured tobacco for absorption of smell and taste. He also submitted that once the coloured tobacco is issued for carrying out the next process of manufacture, its balance in store room shall not tally with the opening balance unless the quantity of coloured tobacco issued for process of manufacturing is also taken into account all these materials i.e. raw tobacco and coloured tobacco continued to be in the premises and were verifiable by the officers on their visit on 2.12.2004, but the officers did not physically verify the same.

5. On the other hand, the learned AR reiterated the findings of the Commissioner (Appeals).

Sd/-

6. We have heard both the parties and perused the records. For better appreciation, Rule 10 of the Cenvat Credit Rules, 2004 is reproduced below:-

> "(i) Every assessee shall maintain proper records, on daily basis, in a legible manner indicating the particulars regarding description of goods produced or manufactured, opening balance, quantity produced or manufactured, inventory of goods, quantity removed, assessable value, the amount of duty payable and particulars regarding amount of duty actually paid."

6.1 Further, it is pertinent to note that on 2.12.2004 when officers of the department visited the factory and recorded the statement of their manager, Shri Onkar Nath Gupta, wherein he categorically explained with verifiable facts the reasons for shortage of raw tobacco and coloured tobacco stored in their respective store rooms. There cannot be any presumptions and assumptions contrary to verifiable facts. We have gone through the statement of Shri Gupta and we find that the alleged shortage of goods could have been verified as per the statement of Shri Gupta, but the department instead of doing the verification for determining the shortage, relied upon the only fact that the appellant did not produce the issue slips. The learned counsel cited the judgment of the Hon'ble Supreme Court in the case of *Oudh Sugar Mills Ltd.* vs. *UOI* reported in 1978 ELT (J-172), wherein the Hon'ble Supreme Court has held as under:-

"13...... in the circumstances, therefore, we must hold that the finding that 11606 maunds of sugar were not accounted for by the appellant has been arrived at without any tangible evidence and is based only on inferences involving unwarranted assumption. The finding is thus vitiated by an error of law."

6.2 The learned counsel also placed reliance on the decision of the Tribunal in the case of *Kalvert Foods India Pvt. Ltd.* vs. *CCE, Mumbai* reported in 2003 (152) ELT 131, wherein the Tribunal has held as under:-

"10. It is well settled that the charge of clandestine removal/ manufacture of the goods by the assessee has to be established by the Department by producing cogent, convincing and tangible evidence and such a charge cannot be based on assumptions and presumptions. In this context, reference may be made to - (i) *TGL Poshak Corpn.* v. *CCE*, 2002 (140) E.L.T. 187; (ii) *MM Dyeing & Finishing*, 2002 (139) E.L.T. 143; (iii) *K. Raja Gopal* v. *CCE*, 2002 (142) E.L.T. 128; (iv) *Prince Ghutka Ltd.* v. *CCE*, 2002 (141) E.L.T. 148; and *Indra Metal Works* v. *CCE*, 1999 (108) E.L.T. 745, wherein such a ratio of the law has been laid down."

6.3 The learned counsel for the appellant has submitted that the entire demand is barred by limitation. He further submitted that the extended period as envisaged under proviso to Section 11A(1) of the Central Excise Act, 1944 has been invoked on the ground that short found raw material has not been recorded in the account books/records maintained by the unit and dutiable goods have been cleared without issuing invoices etc. on the sole intention of evading duty. He also submitted that invoking the extended period is wrong because the entire raw tobacco and coloured tobacco

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were duly accounted for and available in the manufacturing premises. This fact was categorically explained by their manager. The appellant has maintained all such records as are statutorily required and submitted all returns on time. They have maintained complete transparency and explained the shortages on the same day itself. He also submitted that there is no allegation of suppression of facts invoking extended period of limitation. He also submitted that in this case, the officers of the Revenue visited the unit of the appellant on 2.12.2004 and the entire facts including those explained by their manager were in the knowledge of the officers since then, but in spite of that the impugned show cause notice was issued on 6.12.2005 i.e. beyond the period of limitation of one year and therefore the entire demand is not sustainable being barred by limitation. In this context, the appellant relied upon the decision of this Tribunal in the case of *Studio Line Interior System Pvt. Ltd.* vs. *CCE, Bangalore-I* reported in 2006 (201) ELT 250 (Tri.-Bang.), where the Tribunal has held as under:-

> "9. The show cause notice had been issued invoking the extended period of limitation in terms of proviso to Section 11A(1), as it was alleged that the noticee ad suppressed the facts with an intention to evade payment of duty. We find force in the contention of the appellants that the show cause notice dt. 7-10-04, had been issued after a lapse of one year from the date of visit of the Central Excise Preventive Officers in the premises of the appellant. In fact, the officers visited the units on 26-3-03. The units have been registered with the Central Excise and it cannot be said that the excise department was not aware of the activities of the department. Hence, the demands are time-barred."

Therefore, we are of the considered opinion that the entire demand is barred by limitation.

7. After considering the facts and circumstances and the evidence on record, we are of the opinion that the Revenue has tried to prove the charge of clandestine removal merely on the basis of presumptions and assumptions and when the shortage has been explained with verifiable facts with regard to raw tobacco and coloured tobacco, but the Revenue did not verify the facts and in the absence of proper verification of factual aspects, we are of the considered view that the Revenue has failed to prove the clandestine removal and also the demand is time barred. Consequently, we allow the appeal of the appellant by setting aside the impugned order.

(Pronounced in Court on 30.11.2015)

Sd/-
(P.S. Pruthi)
Member (Technical)

Sd/-
(S.S. Garg)
Member (Judicial)

प्रमाणित प्रति / Certified True Copy
17/12/15