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

Dated: 3/5/2016

To

Appellant as per address in table below

Respondent as per address in table below

<u>Final Order No. A/ **70089-70092/2016 DB&MISC ORDER NO 70098-70101/2016** dated 21/01/2016</u>

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/MISC/70041-70044/2015	E/3325-3328/2012EX	OTR PAPERS P LTD B-3&4, UPSIDE INDUSTRIAL AREA, SIKANDRABAD,BULANDSHAHAR UP
		NEERAJ JINDAL,DIRECTOR OTR PAPERS P LTD B-3&4, UPSIDE INDUSTRIAL AREA, SIKANDRABAD,BULANDSHAHAR UP
		SAMEER GARG,DIRECTOR OTR PAPERS P LTD B-3&4, UPSIDE INDUSTRIAL AREA, SIKANDRABAD,BULANDSHAHAR UP
		YOGESH ,SUPERVISIOR OTR PAPERS P LTD B-3&4, UPSIDE INDUSTRIAL AREA, SIKANDRABAD,BULANDSHAHAR UP

Name and Address of Respondent	COMMISSIONER OF CENTRAL EXCISE,NOIDA C-56/42, SECTOR-62 NOIDA

Other Appellants and Respondents as per Annexure

Copy To

<u>3Advocate(s) / Consultant(s</u>

BRAHMADUTTA CHAMBER OF LAW
H-12, G.C.COMPLEX
NAYA BANSA, SECTOR-15,
OPPOSITE NIRULAS HOTEL
NOIDA(UP)

4 Bar Association, CESTAT, ALLAHABAD

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.56), 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 Advisers Pvt. Ltd., LAW House, 1-8, 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 Hill,Panjagutta Hyderabad.-500082

14 C.D.R. 15 Office Copy 16 Guard File

Asstt. Registrar
Regional Bench, Allahabad

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, REGIONAL BENCH : ALLAHABAD

MAs.-70041-70044/15 &
Ex. Appeal Nos.3325-3328/12

Arising out of O/O No.15/Commissioner/Noida/2012-13 dated 27.07.2012 passed by Commr. of Customs, Central Excise & S. Tax, Noida.

For approval and signature:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. H. K. THAKUR, MEMBER (TECHNICAL)

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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? : Yes
3. Whether His Lordship wishes to see the fair copy of the Order? : Seen
4. Whether Order is to be circulated to the Departmental Authorities? : Yes

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(i) M/s OTR Papers (P) Ltd.
(ii) Shri Neeraj Jindal, Director
(iii) Shri Sameer Garg, Director
(iv) Shri Yogesh, Supervisor

...APPELLANT(S)

VERSUS

CCEx,Cus. & S.Tax, Noida

RESPONDENT (S)

APPEARANCE

Shri Anil Kumar Tiwary, Adv. for the Appellant (s)
Shri Rajeev Ranjan, Joint Commr. (A.R.) for the Department

CORAM:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. H. K. THAKUR, MEMBER (TECHNICAL)

CUSTOMS EXCISE & SERVICES TAX APPELLATE TRIBUNAL

DATE OF HEARING & PRONOUNCEMENT : 21. 01. 2016

Final ORDER NO. 70089-70092/2016
MISC. ORDER NO. 70098-70101/2016

Per Mr. Anil Choudhary :

This is second round of litigation. The appellants are in appeal against O/O No.15/Commissioner/Noida/2012-13 dated 27.07.2012 passed pursuant to remand by this Tribunal in Excise Appeal No.2401-2404 of 2010 with a Final Order dated 15.09.2011.

2. This Tribunal found that the appellant needs to be given adequate opportunity of hearing and accordingly, remanded the matter with a direction to the Appellant Company to make further deposit of Rs.20.00 lakhs within four weeks and produce challan before the adjudicating authority and seek opportunity of hearing. It was also observed that the appellants will be entitled to inspect the copy of documents and the relied upon documents and also take the copies and extract thereof, all issues are kept open.

3. In compliance, the Appellant Company complied with the direction of predeposit and appeared before the authority for hearing.

4. Brief facts are that the Appellant Company manufactured un-coated kraft papers from waste. There was an inspection in the premises of the Appellant Company on 26.06.2007 by the Revenue and simultaneously, premises of related transporters and the residence of the Director of the Appellant Company was also searched. On verification of the stock of the finished goods and cenvatable inputs, excess stock of 17.13 MT of un-coated kraft paper standard,

was found and the shortages of 12.98 MT of un-coated kraft paper grade II was found. It was further found that the assessee Company was not maintaining any stock register of raw materials/cenvatable inputs regarding purchase, consumption or any balances. Physical stock of cenvatable inputs could not be co-related with any book balance, hence, the entire stock of cenvatable inputs and the excess stock of un-coated kraft paper standard was seized. Details of issue of other inputs like, rosin and alum submitted by the party was not found commensurate with the production of finished goods for the relevant period. Further, scrutiny of records relating to accountal of major raw materials , namely, waste paper, revealed that the raw material report was prepared by them. It was found that certain deductions were made by the appellant Company from the quantity of waste paper received and net quantity of waste paper was entered into the raw material account, after making deductions for items, like, Kachra, mud and other unusable material present in the lot. The appellant stated that the heads of deduction from waste paper received in the factory are as under :

(i) Tarkol/Kachra

(ii) Moisture

(iii) Other deductions.

But, the bills for inputs were raised by the supplier of the net quantity of waste paper accepted by the assessee. It appears to Revenue that the assessee Company was willfully reflecting higher quantity and value of other deductions in the report so as to suppress the accountal of the raw material with intent to use the same in clandestine production and clearance of finished goods. In the search conducted in the premises of the transporter, M/s Mohan Lal Kalicharan, Sikanderabad on 27.06.2007, who was a transporter of the assessee Company and 12 note books were resumed, which were in the nature of log books of the vehicles and contained details of transportation of finished goods of the appellant. On comparison of entries in the log book, it appear to Revenue that only some clearances matched, in large number of instances, no corresponding invoices showing removal of goods was issued by the appellant company. Thus, it appeared that the appellants have clandestinely removed the finished goods, which were excisable without payment of duty. Search was also conducted at the premises of M/s Kalkaji Papers at Kalkaji, Delhi. During search, packing slips were recovered. On the said packing slips, the name of the party along with reel-wise details were indicated. Shri Paras Singhal, proprietors of M/s Kalkaji Papers, admitted that they have received kraft papers from the appellant Company against the said packing slips without cover of any bills/invoices and that the said goods were transported by the party in their own vehicle, for which no freights were paid. It further appeared to Revenue that the said M/s Mohan Lal Kalicharan, the transporter of the appellant Company, have assisted in clandestine removal and payment have been made by the said Shri Paras Singhal in cash to the Director, Shri Sameer Garg, of the appellant Company.

5. SCN dated 31.03.2008 was issued proposing to levy duty of Rs.65,27,331/- on goods removed without payment of duty and Rs.2,52,924/- was supposed to be demanded on the goods removed to M/s Kalkaji Papers on the basis of packing slips recovered and further penalty was proposed on the Appellant Company as well as its two Dirctors, Shri Neeraj Jindal and Shri Sameer Garg and also on Shri Yogesh, Supervisor of the Appellant Company.

6. SCN was adjudicated and the amount of Rs.60,79,887/- was confirmed against proposed demand of Rs.65,27331/- based on the entries in the note book/log book of the transporters. Further, Rs.2,33,400/- was confirmed against proposed demand of Rs.2,52,924/- and penalty of equal amount was imposed totaling Rs.63,13,287/- upon the Appellant Company under Section 11AC read with Rule 25 of the Central Excise Rules, 2002 and penalty of Rs.2.50 lakhs each was imposed on Shri Neeraj Jindal and Shri Sameer Garg, both Directors of the Appellant Company and further penalty of Rs.75,000/- on Shri Yogesh, Supervisor of the appellant Company, all under Rule 26 of the Central Excise Rules, 2002.

7. The ld.Counsel for the appellants, states that the proper opportunity of hearing have not been granted , inasmuch as the cross examination of the person, the statement of which have been relied upon, have not been granted. He further points out that pursuant to remand order by this Tribunal in the earlier round, the Adjudicating authority have failed to record independent findings and in the finding portion at Para 22 of the impugned order, have recorded as follows :

"22.................................No new facts have been advanced by the parties so as to reconsider the case on merits. Therefore, I am in total agreement with the findings of the Adjudicating Authority in Order in Original No.01/Commr./Noida/2010-11 as regards the computation of duty, culpability of the co-noticees, amount of Central Excise Duties confirmed and the penalties imposed."

Accordingly, he prays for setting aside the impugned order with the direction to the ld.Commissioner to provide an adequate opportunity of hearing including cross-examination of the person, whose statements have been relied upon and also from whose premises, documents recovered, have been relied upon. He further states that the Miscellaneous Application filed for grant of further stay, may also be disposed off accordingly.

8. The ld.A.R. for the Revenue relies on the impugned order.

9. Having considered the rival contentions, we find that the ld.Commissioner has not offered the cross examination of person's statement of which were recorded and relied upon in the adjudication order, the same has caused prejudice to the appellant. It appears that the whole case is based on evidences collected from third party premises as well as the statement of son of the transporter, Shri Mukul Goel, son of Shri Mohan Lal. Shri Mukul Goel, in his statement, available at Exibit-C, has stated that he assisted his father, Shri Mohan Lal, who is proprietor of concern "Shri Mohan Lal Kalicharan", although the entries in the note book/log book are maintained by the driver of the vehicle, but at times he also makes entries as per information

given by the Driver. Further, in the statement, Shri Mukul Goel has stated that his father owns one truck and two trucks bearing Nos.UP13H9025 & UP13B9939 belongs to his uncle (Chachaji), whose name is Shri Dinesh Kumar, son of Late Jagdish Prasad. The impugned order-in-original is silent as to what statements have been given by the respective persons. We also find that the appellants had prayed for cross examination of Shri Mohan Lal, Proprietor of M/s Mohan Lal Kalicharan and also other person, who wrote log book including the drivers, who allegedly maintained the log books. The appellant's application for cross examination was rejected by the ld.Commissioner vide communication dated 04.06.2012 stating that Shri Mukul Goel, son of Shri Mohan Lal was present at the time of search and he admitted transportation of the goods from the appellant Company and admitted to maintain the log book by the driver and himself. In view of the non-retraction of his statement till date, the statement holds good. Further, the Department has not recorded or relied upon the statement of Shri Mohan Lal or any other driver of the vehicle and as such, this request for cross examination stands rejected on merit. As regards searched conducted for other places, it was informed that these documents do not form part of the SCN. We find that non-examination of the concerned person, whose statements have been relied upon is in violation of Section 9D of the Act, which provides that where any statements are to be relied upon of any person, in any proceedings under the Act, then such person must be examined in the proceedings under the Act, which includes adjudication proceedings. Further, cross-examination has to be essentially given in the facts of in the present case as statements of the concerned persons are recorded at the back of the appellants.

10. In view of our observations and findings, we set aside the impugned order and remand the matter for denovo adjudication by the Commissioner with direction that he shall examine and witnesses in presence of the appellant Company, Director and/or their Authorized Representative and shall also offer his witnesses for cross-examination, particularly, (i) Mukesh Goel, (ii) Mohan Lal and (iii) Paras Singhal. The appellant shall be provided inspection of documents either relied upon and/or not relied upon, a copy of which, if they have not been given earlier shall be provided. Thereafter, the appellants, if they so desire, can file supplementary rely to the show-cause notice and after hearing the parties, the adjudication order shall be recorded by the authority.

11. Thus, all the appeals are allowed by way of remand. Miscellaneous Applications also get disposed off. There shall be stay of balance dues, till passing of order pursuant to remand.

12. The appellants are also directed to appear before the Commissioner, within 45 days of receipt of this Order and seek opportunity of hearing.

(Pronounced in the open Court)

Sd/- Sd/-

(H.K.THAKUR)
MEMBER (TECHNICAL)

(ANIL CHOUDHARY)
MEMBER (JUDICIAL)

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प्रमाणित प्रति / Certified True Copy

15.3.16

सहायक पंजीकार / Asstt. Registrar
सीमाशुल्क, उत्पादशुल्क एवं सेवा कर
अपील अधिकरण / (C.E.S.T.A.T.)
38, एम. जी. मार्ग, इलाहाबाद-211001
38, M. G. MARG, ALLAHABAD-211001