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

To

Dated: 20/1/2016

Appellant as per address in table below

Respondent as per address in table below

Final Order No. A/ 70035/2016 dated 18/1/2016

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/3097/2010	JALAN CONCAST LTD NAKHI NO-2, PO-JUNGLE BENI, MADHAR DISTT- GORAKHPUR(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 BIPIN GARG,ADV
B-I/1289-A, VASANT KUNJ
NEW DELHI-70

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.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, 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,Punjagutta 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

Ex. Appeal No.3097/10

Arising out of O/A No.197/CE/Alld./2010 dated 20.07.2010 passed by Commissioner of Central Excise (Appeals), Allahabad

For approval and signature:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)

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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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M/s Jalan Concast Ltd.

...APPELLANT(S)

VERSUS

Commissioner of Central Excise, Allahabad

RESPONDENT (S)

APPEARANCE

Shri Bipin Garg, Adv. for the Appellant (s)
Shri V. K. Shastri, A.C. (A.R.) for the Department

CORAM:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)

DATE OF HEARING : 29. 10. 2015

DATE OF PRONOUNCEMENT : 18-1-2016

Final ORDER NO. 70035/2016

Per Mr. Anil Choudhary :

The appellant is engaged in the manufActure of MS ingots, MS bars falling under chapter 72 of the schedule to CETA. Present appeal is against order in appeal dated 20/7/2010 passed by the Commissioner of Central Excise appeals, Allahabad.

2. The brief fActs are that there was an inspection in the fActory of the appellant on 18/6/2008 which continued to 19/6/2008. The inspection team inpected the records and stock of raw materials and finished goods in presence of the director and two independent panch witnesses. During the inspection the stock of finished goods of MS ingots and MS bar was found to be huge, and Actual weighment of the whole stock was not feasible. With the consent of the director sample weighment of MS ingots and of MS Bars was done for convenience and thereafter the total quantity of stock available in the fActory premises was estimated by multiplying the quantity with the average weight of one MS ingot of the sample. The production of ingots on the date of inspection was excluded and the same was stored separately. Total ingot was found to be 3973 numbers. According on calculation, stock of MS ingots was found to be 433.931 MT (3973 X 109.22 KG). Similarly average weight of one bundle of MS bar was found to be 99.20 KG multiplied with 24,639 bundles and added with the weight of loose bars lying scattered was found to be 2449.680 MT (24639 x 99.20+5490 KG). There was no clearance of finished goods on the date of visit. The stock so estimated was compared with the opening stock on 18/9/2008 and discrepancy or shortage was found as follows:

Commodity	Opening Balance of finished goods as per record as on 18.06.2008	Actual stock of finished goods found in physical verification on 18/19.06.2008	Quantity of stock found in short	Value of short found stock (In Rs.)	Duty payable on the short found stock of finished goods (in Rs.) inclusive of Edu.and S.H.Edu.Cess
M.S.Ingots	547.940 MT	433.931 MT	114.009 MT	2850225.00	411003.00
M.S.Bars	2639.650 MT	2449.680 MT	189.970 MT	5699100.00	821810.00

Show cause notice dated 5/11/2008 was issued stating therein the aforementioned Acts. It is also alleged that when the Director, Mr.O. P. Jalan, was questioned regarding the shortage, who was present during the process of checking, could not explain it and admitting the shortage agreed to pay the duty thereon, as is mentioned in the Panchnama drawn recording the proceedings of the inspection. The statement of the director-Mr O.P.Jalan was recorded on the spot on 19/6/2008 wherein he interalia expressed satisfAction as to the manner of stocktaking. Further on 19/6/2008 the appellant deposited Rs.4,11,003/- for shortage of MS ingots and Rs.8,21,810/- towards shortage of MS bar. After a few days the Director Mr Jalan was again interrogated on 7/7/08 under section 14 of the Act. On the said date the director explained the discrepancy in the stock detected for the reason that immediately on production the ingots are very hot and cannot be touched by hand. Production is recorded on estimated weight. Further the person reporting the production figures is hardly matriculate and production and stock figures are bound to vary on actual weighment. He admitted the contents of his statement dated 19/6/08. It appeared to revenue that in absence of cogent explanation the appellant have surreptitiously cleared the final products found short without payment of appropriate duty and without observing the mandate of law and have suppressed the ~~Acts~~ fact of such removal with intent to evade payment of duty. Accordingly, the appellant was required to show cause as to why proposed demand be not confirmed and appropriated and further why not penalty be imposed under section 11 AC of the Act.

3. The appellant appeared and contested the show cause notice and the same was adjudicated and the proposed demand of Rs. 12, 32,813 was confirmed and appropriated, ~~along with~~ Equal amount of penalty under section 11 AC for the contravention of the provisions of rules 4, 6, 8, 10, and 11 of the CER 2002.

4. Being aggrieved the appellant preferred appeal before the Ld. Commissioner Appeals, who was pleased to reject the appeal observing that the stocktaking was done in presence of the director of the appellant and accordingly no shortcoming pointed out subsequently is entertainable. The Director has, in the statement, recorded at the time of inspection ~~and~~ admitted the shortage. Although the appellant had after a day or two of the inspection, raised the objection as to the method of valuation, raising doubt as as to the correction of the method and also prayed for the revaluation. But in the subsequent statement dated 7/7008 the director again accepted the shortage, admitted the verification process carried out on the date of

inspection. Further acceptance of shortage twice under section 14 of the Act obliterates, the denial made and dispute raised soon after Inspection.

5. Being aggrieved the appellant is in appeal before this Tribunal.

6. The Ld. Counsel has drawn my attention to the Panchnama drawn at the time of Inspection. The Inspection commenced at 11 AM on 18/6/2008 and was concluded on 19/6/08 at about 4 AM. Further the calculation sheet annexed to the panchnama, for verification of stock states that average weight of one MS ingot was assertained after weighment of four bundles and thereafter the said weight was multiplied with the number of ingots and accordingly the stock was assessed at 433.91 MT. Similarly, for ascertaining the stock of MS bar average weight of one bundle of MS bar was ascertained at 99.20 KG and the said weight was multiplied with the number of bundles and further the loose MS bar were gathered on a vehicle and weighed accordingly aggregating 2449.680 MT. The Ld. Counsel further urges that the statement recorded on 19/6/08 have been recorded sometime after 12 o'clock in the night and before 4 AM. Thus, statement recorded in the dead of night when a person is supposed to sleep cannot be said to be free from coersion and undue influence and as such the same is not reliable. That no reliance can be placed on such a statement being not freely given, where the person giving the statement is tired and deprived of sleep. He further urges that this manner of stocktaking has got no legal sanction having probability of errors and is only an approximate estimation. Based on such estimation it cannot be conclusively said that that is discrepancy and

shortage in the stock. It is further urged that the appellant have no where admitted any clandestine removal by them. It was also stated that the person reporting the production data in the factory is not much educated and as such there are chances of discrepancy due to inadvertence. It is further stated that ~~that~~ there is no Actual shortage. Neither there is any evidence of clandestine removal of the goods. Only deposit of tax by the appellant on being pressurised by the officers of the inspection team, no adverse inference can be drawn. The appellant had immediately after the inspection requested for a reverification by Actual weighment which was not done by the revenue without there being any justification for the same. It is also stated that MS Ingots are of different sizes and weight. The weight varies between 106 to 147 Kgs. as MS ingots are not homogeous in shape and size. For that the weight also depends upon the cross-section of ingot which varies widely from one ingot to the other. Further, MS Bars were of different diameters such as, 10 mm, 16 mm, 20 mm and 25 mm. Thus, if MS Bars are cut to same size, still the weight is bound to vary. It is further urged that less than 1% of the stock was actually weighed and the average weight was multiplied with the number of MS Ingots. Thus, there is bound to be discrepancy and variation in the physical stock and that as per the books records. Accordingly, the confirmation of duty and levy of penalty is unjustified. The ld.Counsel further relies on the rulings in the case of Shirpur Shetkari SSK Ltd. Vs. CCE : 2007 (209) ELT 442, where it has been held that shortage of finished goods by itself cannot be a ground for alleging clandestine removal. The said ruling was confirmed by the Hon'ble Supreme Court in 2008 (222) ELT A133. Reliance is also placed on the ruling of the Hon'ble Allahabad High Court in the case of CCE Vs. Star Steels : 2015 (315) ELT 495. Under the fact that the stock which was found in the premises of the assessee, 581 MT and there was no actual measurement or weighment while determining as to whether there was any excess stock. Further exercise appears to have been carried out on the basis of eye estimation. Moreover, it was also not possible within 6 hours, the inspection team could have physically weighed approximately 581 MT of stock. Hence, the conclusion that there is excess stock, By Revenue, it was held that the conclusion of the Revenue is incorrect and mere suspicion cannot take place the proof of an intent to clandestinely remove excisable goods. Further, relying on the ruling of Hon'ble Allahabad High Court in the case of CCE Vs. Menakshi Castings wherein it was held that without evidence of clandestine removal, no penalty can be imposed for shortage of finished stock. Accordingly, the appellant prays for setting aside the impugned order with the grant of consequential relief. It is also urged that at the stage of production, ingot is in hot and molton condition and as such production is recorded on estimation basis. The Actual weighment is done only at the time of sale/clearance.

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

8. Having considered the rival contentions, I find that there is discrepancy in the manner of stock~~pic~~taking. Such manner of stocktaking can give only an estimation and an approximate result. Based on such an approximate calculation which is in the nature of eye

estimation, no adverse inference can be drawn against the appellant. It is further evident that the statement recorded of the director on 19/6/08 was recorded in the dead of the night and as such no reliance can be placed on any admissions made in such a statement which can not be said to be freely given. It also indicates the high handedness adopted by the inspection team during the course of inspection and recording of statement. I further hold that deposit of tax does not amount to admission on the part of the appellant. The appellant have neither shown or admitted clearance in the subsequent returns and not have admitted any clandestine removal categorically. On being questioned, pointedly for the alleged shortage it was stated by the Director, the production figures are reported by the person who is not much educated and as such there are discrepancies due to inadvertence. I further find that revenue have not brought any incidence or corroboration as to clandestine removal of the finished goods. I find that the ruling relied upon by the counsel for appellant, is squarely applicable. In this view of the matter I allow the appeal and set aside the impugned order. The appellant will be entitled to consequential benefit in accordance with law.

9. Thus the appeal is allowed.

(Pronounced in the open Court on..18-01-16.....)

Sd/-

mm

(ANIL CHOUDHARY)
MEMBER (JUDICIAL)

प्रमाणित प्रति / Certified True Copy
21.1.16
सहायक पंजीकार / Asstt. Registrar
सीमाशुल्क, उत्पादशुल्क एवं सेवा कर अपील अधिकरण / C.E.S.T.A.T.
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38, M. G. MARG, ALLAHABAD-211001