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REGISTERED / AD

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
38,MG Marg Civil Lines,Old Red Building,Allahabad-211001
SINGLE MEMBER APPEAL BRANCH

Dated: 28/06/2016

To

Appellant as per address in table below

Respondent as per address in table below

Final Order No. A/70289/2016-SM[BR] dated 17/06/2016

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
1	E/50088/2015	KUMAR INDUSTRIES C-2 INDUSTRIAL AREA NADARGANJ LUCKNOW,UP
		Name and Address of Respondent
2		C.C.E. & S.T.-LUCKNOW 7-A,.ASHOK MARG, LUCKNOW,UTTAR PRADESH-226001

Copy To

3Advocate(s) / Consultant(s):

SH A.P.MATHUR,ADV
167, TAGORE TOWN
ALLAHABAD

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, 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 M/S Knowledge Processing Pvt. ltd.(taxmanagementindia.com),FF-19,1st Floor,Cross River Mall,CBD Ground,Near Karkardooma Court,Delhi-110032
15 C.D.R.	16 Office Copy	17 Guard File

Asstt. Registrar

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, REGIONAL BENCH : ALLAHABAD

Single Member Bench

Excise Appeal No. E/50088/2015(SM)

[Arising out of Order-in-Appeal No. 173-CE-LKO-2014 dated 10.10.2014 passed by Commissioner (Appeals) Central Excise, Lucknow]

For approval and signature:

Hon'ble Shri Anil Choudhary, Judicial Member

1.	Whether Press Reporter may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	
2.	Whether it would 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?	
4.	Whether order is to be circulated to the Department Authorities?	

M/s Kumar Industries — Appellant

Vs

C.C.E., Lucknow — Respondent

Appearance:

Present for the Appellant: Shri A.P. Mathur, Advocate
Present for the Respondent: Shri Sanjay Hasija, Superintendent (AR)

Coram: **Hon'ble Shri Anil Choudhary, Judicial Member**

Date of Hearing/Decision: 21/12/2015

Final **ORDER NO.** 70289/2016

Per: Anil Choudhary

The appellant is in appeal against Order-in-Appeal dated 10/10/14 by which duty has been confirmed on the stock of raw material and finished goods found short along with penalty, on the date of inspection.

2. The brief facts are that the appellant is a manufacturer of MS angles, flats etc. and the raw material is MS ingots. An inspection was conducted on 01/8/2012 in the factory premises. The officers found that a huge the stock of MS angles and MS flats of different length and breadth was lying in a haphazard way, difficult to count/value. Thereafter the officers with the consent of the Partner present, Shri Somit picked up 10 pieces of MS Ingots at random and recorded the weight and accordingly picked 10 pieces of MS Bars. The total weight so recorded was divided by 10 and the same was multiplied by the total number of Ingots and Bars available. Accordingly stock verification statement was drawn and in the stock of finished goods of MS Bar against opening stock of 109.215 M.T. stock was worked out at 103.950 M.T, thus the difference or shortage of 5.265 M.T. So far the stock of raw material – MS Ingots the opening balance on the day was 380.370 M.T and the same was calculated at 350.140 M.T. giving a shortage or difference of 30.230 M.T. In the statement recorded on the date of inspection the Partner present stated that he is satisfied with the method of stock taking but on further question as to the difference found he stated that he is unable to explain the same immediately. On further being insisted he said that he shall pay the duty on this shortage in stock found. On the very next day that is 02/8/12, as is evident from the Order-in-Original appellant filed the representation before the authority which was received in the office of the authority on 06/8/12 that they have forgotten to count 290 pieces of inputs which had been charged in the furnace but had not been recorded in the stock records and the average rate of the same is almost equal to the

difference in the stock of raw materials. Accordingly he urged that there is no shortage in the stock of raw material and paid the duty demanded on M.S. Bars, Rs. 23,232/- on 6/8/12. It is further the fact on record that there was no electricity since 31/7/12 and hence the production was lying stand still at the time of inspection.

3. Show Cause Notice dated 26/2/13 was issued as it appeared to revenue that the shortage of raw material have not been adequately explained and explanation given subsequently vide letter dated 2/8/12 was not believed and accordingly proposed to demand Excise duty of Rs. 1,39,062/- (Rs. 23,232/- on finished goods plus Rs.1,15,830/- on the material). The appellant contested the show cause notice stating that the proposed demand is on presumption and assumption and that there is no actual shortage. It is further urged that the manner in which the stock was taken gives only some approximate figure and there is bound to be variation and as such no adverse inference can be drawn for the variation which is normal. In the case of finished goods the variation is less than 5% and in the case of raw material although the variation in adequately explained the same is not more than 10%. The SCN was adjudicated and the proposed demand confirmed and equal amount of penalty was imposed under Rule 25 of Central Excise Rules and read with Section 11 AC of the Act. Being aggrieved the assessee preferred appeal before the Commissioner (Appeals) who vide the impugned order have been pleased to dismiss the appeal observing that the appellant have them self deposited the duty on the shortage of finished goods which shows the satisfaction as to the process of stock taking and further observed that in the letter dated 02/8/12 of the appellant the legality veracity of the statement recorded was not challenged. It was also that there was no production in the factory of the appellant

on 31/7/12 and 01/8/12 due non availability of electricity and accordingly there would not be any possibility of feeding the electric furnace with MS ingots, as claimed by the appellant.

4. Being aggrieved the appellant is before this Tribunal. The ld. Counsel Shri A.P. Mathur, urges that there is bound to be variation in the method of stock taking adopted by the physical verification. It is admitted fact that 10 pieces of finished goods or raw material were weighed and their average weight was multiplied with the number of pieces. In such method of valuation of stock, some variation is bound to be and the variation found in the case of the appellant is normal and no adverse inference could have been drawn. He further states that the appellant had given declaration within 5 days of the inspection stating that the raw material charged in the furnace which was about 219 pieces, weighing about 29.725 M.T, which is almost equivalent to the difference or shortage in weight at 30.230 M.T. Further without verification of the fact asserted by the appellant the Adjudicating Authority and the ld. Commissioner have erred in rejecting the cogent explanation without actual verification of the same. He further urges that in view of the possibility of variation in such method of verification of stock the difference found is normal variation and accordingly prays for setting aside the impugned order with consequential relief. The ld. Counsel further relies on the ruling of Hon'ble Allahabad High Court in the case of CCE versus Meenakshi castings where in the Honourable High Court held that in absence of any evidence of clandestine removal, only on the apparent shortage of stock the Tribunal have found that there is no material or evidence to support findings, adverse inference is not attract ed, deleted the penalty imposed under section 11 AC of the Act. The ld. Counsel also relies on the ruling of a coordinate bench of this Tribunal in the

case of R.A. Casting Private Ltd. Vs. Commissioner of Central Excise and Service Tax Meerut-I 2015 (318) E.L.T. 433 (Tri.-Del.) wherein also in the case of shortage of finished goods and inputs, without the there being any evidence of clandestine removal, it was held that penalty is not imposable.

5. The learnedly AR for revenue relies on the impugned order. The learnedly AR further relies on the ruling of the Honourable Allahabad High Court in the case of Bajrang Petro Chemicals (P) Ltd. Vs. Commissioner of Central Excise reported in 2014 TIOL-2254-HC All-CX where in the case of huge shortage of finished goods found during stock taking and the assessee could not offer any explanation and admitted the shortage and paid the duty, the Honourable High Court held that in view of the fact that no explanation was offered of the shortage found at the time of stocktaking and further duty was paid on the same, amounts to admission on the part of the appellant and such admission of goods found short, inference can be drawn that the same have been removed without payment of duty. The learnedly AR also relies on the ruling of Madras High Court in the case of Goyal Ispat Ltd. reported in 2015 (324) E.L.T. 392 (Mad.) wherein the case of stock taking conducted on the basis of eye estimation, the question being considered was, whether stock taking done on the basis of eye estimation was proper. The High Court did not accept the findings of the Commissioner (Appeals) that the shortage could not be ascertained in the manner done by the Department. Further the assessee has been unable to establish that recording of shortage was erroneous. Further it is a finding of fact that the Tribunal on the statement drawn in the Mahazar/Panchnama and other records on which the High Court did not dwell further to come to a different conclusion. Further held that

non production of the Panchnama witness was not fatal to the case. It was further observed that finding of the Tribunal are based on Panchnama records, recording the shortage of goods which had been done in presence of an independent witness and such shortage was supported by the unretracted statement of the manager. It was held that the Tribunal was correct in confirming the order of penalty. Under similar facts and circumstances of stock valuation donè on eye estimation and the assessee had not protested and paid the duty, this Tribunal in the case of Shivkripa Ispat Pvt. Ltd. Vs. Commissioner of Central Excise 2010 to (262) E.L.T. 477 (Tri. Mumbai) held the duty can be demanded on such shortage for clandestine removal. Further the learnedly AR also relies on the ruling in the case of Karori Engg. Works Vs. Commissioner of Central Excise reported in 2004 (166) E.L.T. 373 (Tri.-Del) wherein it was held that the mere fact that the signature of the officers of Central Excise was not there on the statement, the same is immaterial especially when the maker of the statement (Partner) have not denied of having made the same and had not even retracted the same at any stage. The learnedly AR also relies on Zaki Ishrati versus Commissioner of Central Excise 2010 (255) E.L.T. 545 (Tri.-Del.) wherein also in the statement recorded, the concerned officer had not appended his signature in the statement it was held that the statement made in own handwriting and delivered to the investigating officer, the same may not be treated as a statement under section 108 of the Customs Act, but the same is to be treated as a report to investigating officers and the evidentiary value of the same cannot be underestimated.

6. Having considered the rival contentions I find that in the method of stock verification adopted there is bound to be variation. Further the variation found is about 10% in the case of raw material

and less than 5% in the stock of finished goods which I hold as normal variation in such method of calculation. Secondly I find that the appellant had given cogent explanation regarding the shortage of raw material within 5 days of inspection, by stating that the raw material charged in the furnace had escaped to be noticed in the stock verification and the same was not entered in the stock records/RG1, and accordingly there is no discrepancy in the stock of raw material. This claim of the appellant was rejected on assumption & presumption without verification. I further note that in the statement given by the partner on the date of inspection he had stated that he would be able to explain the discrepancy only at a later stage and have come forward and explained the discrepancy which was not found untrue but was rejected without verification. In this view of the matter I hold that the variation found is a normal variation and no adverse inference could be drawn. Accordingly I allow the appeal and set aside the impugned order. The appellant shall be entitled to benefit, if any, consequential in accordance with law.

(Dictated and pronounced in the open Court)

Sd/-

(ANIL CHOUDHARY)
MEMBER (JUDICIAL)

True Copy

8.7.16

(K. Gupta)