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

Dated: 14/1/2016

To

Appellant as per address in table below

Respondent as per address in table below

<u>Final Order No. A/ 70028-70029/2016 SM dated 20/10/2016</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/50683/2014	APOLLO PIPES LTD KHASRA NO 2829&2938 DHOOM MANIKPUR DADRI , GAUTAM BUDH NAGAR UP
	Name and Address of Respondent	CCE, GHAZIABAD CGO COMPLEX-II KAMLA NEHRU NAGAR GHAZIABAD

Other Appellants and Respondents as per Annexure

Copy To

3<u>Advocate(s) / Consultant(s</u> 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,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 Nos.50683/14

Arising out of OIA No.GZB/EXCUS/000/APP/161/2013-14 dated 15.10.2013 passed by Commissioner of Central Excise (Appeals) & S. Tax, Ghaziabad.

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.

M/s Apollo Pipes Ltd.

...APPELLANT(S)

VERSUS

Commissioner of Central Excise & S. Tax, Ghaziabad

RESPONDENT (S)

APPEARANCE

Shri A. P. Mathur, Adv. for the Appellant (s)
Shri Ashok B. Kulgod, A.C. (A.R.) for the Department

Ex. Appeal Nos.50601/14

Commissioner of Central Excise & S. Tax, Ghaziabad

...APPELLANT(S)

VERSUS

M/s Apollo Pipes Ltd.

RESPONDENT (S)

APPEARANCE

Shri Ashok B. Kulgod, A.C. (A.R.) for the Department
Shri A. P. Mathur, Adv. for the Respondent (s)

CORAM:

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

DATE OF HEARING & PRONOUNCEMENT : 20. 10. 2015

Final ORDER NO. 70028-70029/2016

Per Mr. Anil Choudhary :

These cross appeals arise from OIA No.GZB/EXCUS/000/APP/161/2013-14 dated 15.10.2013 passed by Commissioner of Central Excise (Appeals) & S. Tax, Ghaziabad. The order in original, imposed a duty and penalty on the stock of finished goods and raw materials found short at the time of physical verification on 26/11/10. In appeal, the learned Commissioner (Appeals) confirmed the duty but was pleased to waive the penalty. The appellant assessee is in appeal against confirmation of duty whereas the revenue is in appeal against waiver of penalty allowed by the impugned order.

2. The assessee, M/s Apollo Pipes Limited. is a manufacture of PVC pipes of various grades and sizes and fittings thereof. They are also availing the facility of Cenvat credit on the inputs and capital goods. An inspection was carried out in factory premises on 25.11.10 and 26.11.2010. During the visit, records were examined and physical stock taking was done of both finished goods and raw materials, lying in the unit. It is further alleged in the SCN that due to non-availability of manpower and also due to insufficient lighting arrangements the stock taking could not be done or completed on 25th of November 2010, and the same was continued on the next date. Panchanama was

drawn up on the spot and a statement of Shri Veer Pal Sisodia, Accountant and Central Excise In-Charge of the factory, was recorded. He stated that the sale of the goods is controlled by Head Office. He makes entries in daily production and dispatch of Register on the basis of daily production and raw materials and consumption report provided to him. The said records are maintained under the supervision of Shri N.S.Rana. Statement of another person, one Mr. Anil Kumar was recorded, who prepared the daily production report and consumption of raw materials and handed over the same to Shri V.P.Sisodia. The Excise officers conducted physical verification of both finished goods and raw materials in presence of Shri N. S. Rana and Mr Mukesh and the details are recorded in Annexure A to the Panchanama dated 26/11/2010. The stock of goods as verified when compared with the recorded balances in RG-1 and relevant Part I, a shortage of 62212 KGs in the stock of PVC pipes and fittings valued at Rs. 33,36,181/- and 7683 kgs in stock PVC resin valued at Rs. 3,92,601/- was detected by the officers involving Excise duty amounting to Rs. 3,43,626/- on the PVC pipes and fittings and Rs.40,438/- on PVC resin. A statement of Mr Rana, the General Manager (Works) was recorded on 26/11/2010 wherein he stated that unit have come into existence in November, 2009 by transfering of plant and machinery from their unit I & II at Sikandrabad which are now closed. The work of production and clearances is monitored by him on day to day basis. As regards the shortage found, he stated that although the calculations have been drawn in his presence but the rate was calculated on the basis of the average weight of 10 pipes for each size and that seems to be the obvious reason for variation. It is further stated that he would look into the reasons for variation and inform the revenue in due course.

3. A show cause notice dated 23/11/2011 was issued alleging therein that under the provisions of rule 10 of the rules read with rule 9 of Cenvat credit rules an assessee is required to record the production and clearance of finished goods, raw materials in the Books of Accounts. Whereas the appellant has failed to specify the exact reasons responsible for the shortage noticed in the stocks of finished goods and raw materials. Accordingly, it appears that the appellant has clandestinely removed the goods found short at the time of physical stock taking on 26.11.2010 in a manner other than as prescribed in the Central Excise Act, 1944, with intent to evade payment of duty. Accordingly, the appellant assessee contravened the provisions of Rule 4 (duty payable on removal), Rule 6, rule 8 (Manner of payment of duty), rule 10 (Daily stock account) and rule 11 (Goods to be removed on invoice) of Central Excise Rules, 2002. Further in terms of sub rule 5 of rule 3 of Cenvat Credit Rules, 2004, the assessee was required to pay an amount equal to the credit availed in respect of inputs removed clandestinely. Accordingly it was proposed to levy of duty with penalty and interest on this shortage found in the stock of finished goods and raw materials.

4. The appellant assessee contested the show cause notice by filing reply dated 5/11/2012. It was urged that at the time of inspection in the statement recorded of Mr Rana, General Manager, it was stated that the reason for shortage may be due to calculation of weight on

the average basis of the finished products. It is further stated that there being no allegation or any incidence of clandestine clearance found on the part of the appellant assessee the whole proceeding is bad and fit to be dropped. It was further stated that the stock taking is an approximate figure drawn on the basis of average weight of 10 pipes and accordingly whatever variation and/discrepancies, found the same is normal variation not calling for any adverse inference. Further it is urged that as the assessee have paid the duty on the alleged shortage prior to issue of show cause notice, at the investigation stage itself, the issue of show cause notice is bad and fit to be dropped. It is further stated that the assessee cleared the goods under cover of invoice and no circumstances have been found of any clandestine removal. It was further urged that the finished goods produced on physically weighed before the entry in the stock register and similarly every consignment of goods is cleared only after physical weighment of the goods.

5. The SCN was adjudicated vide order in original dated 28.2.2013 and the proposed demand of Rs 3,43,626/- on shortage of finished goods and Rs 40,438 on shortage of raw materials was confirmed further penalty of Rs 3,43,626/- was imposed on the appellant company under rule 25 read with section 11 AC and Rs. 40,438/- under rule 15 of Cenvat Credit Rules,2004 read with section 11 AC of the Act and the payments had been made of the assessee the same was appropriated. Being aggrieved the appellant preferred appeal before the Commissioner(Appeals). The learned Commissioner

(Appeals) allowed the appeal in part by confirming the duty but was pleased to delete the penalty imposed both under Rule 25 of CCR and Rule 15 of CCR read with section 11 AC of the Act. The ld. Commissioner in his order has observed as follows while confirming the duty –

> "6.2 As the Appellant has not been able to explain the reasons of shortage in finished goods as well as inputs, duty involved in such shortage is liable to be recovered from them. The above finding finds force from the judgement of the Hon'ble High Court of Madras in the case of Alagappa Cements Pvt. Ltd. Vs. CEGAT, Chennai : 2010 (260) ELT 511 (Mad.) wherein it has been held that 'If really the inspecting officials did not make proper verification of the stock at the time of inspection, it is quite normal that the aggrieved assessee would have immediately objected to any such improper method of verification of stock then and there. When two of the officials gave their statements expressing their ignorance about the shortage of clinkers, it was for the appellant to satisfactorily explain the said defect in the maintenance of records or the actual availability of stock.
>
> 6.3 The department has further alleged the charges of clandestine removal on the goods found short. However, I find there is no positive evidence adduced by the department to prove clandestine removal. The burden to prove removal without payment of duty is on the department. Without corroborative evidence, it is legally untenable to show such removal only on the basis of certain assumptions. The Hon'ble

> CESTAT, Delhi in the case of Swaroop Castings Pvt. Ltd. Vs. Commissioner of Central Excise, Meerut I : 2013 (290) ELT 0392 (Tri.-Del.) has allowed the appeal by observing that the charges of clandestine removal cannot be upheld on mere shortages. Therefore, there must be clear evidence and mere shortage in final products, which could be due to variety of reasons, cannot be the basis of removal by evading duty. Thus, the allegation of clandestine removal without any concrete evidence does not have any merit in view of catena of judgements in which it has been uniformly held that clandestine removal is a serious allegation which requires to be proved by way of tangible evidence and allegations on the basis of assumptions and presumptions are un-sustainable. The appellant deposited the duty involved on the shortage of finished goods at the time of detection itself that is well before issuance of show-cause notice. Therefore, imposition of penalty equal to the duty involved on the shortage under Rule 25 of the Central Excise Rules, 2002 read with Section 11AC will not be appropriate in absence of any evidence to prove clandestine removal".

He further explained that the discrepancy in shortage is due to estimation of the weight.

6. The ld. Counsel for the appellant assessee urges that the stock taking is an approximate stock figure, as is evident from the manner in which the stock taking was done. The appellant maintained the stock records on the basis of actual weight, whereas as at the time of Inspection-average weight of 10 pipes was taken and the same was

applied to the approximate number of pipes of finished goods available. Thus, the variation and the discrepancy found, which is about 10% of the finished goods, is normal variation. He further stated that in absence of any instance of clandestine removal, the duty assessed on the same on estimation, is bad and fit to be set aside. So far the raw material - PVC resins is concerned the gross weight found on the date of inspection was 1,61,500 kg and the shortage was worked out at 7,683 kg which is less than 5%. As such there being minor variation, no adverse inference should have been drawn without any cogent material justifying the same. He further urges that the appellate authority in spite of appreciating the facts that the revenue have not made out any case of clandestine removal and they have made out a case of improper recording of production records and/or record of raw materials – inputs. As such, he has erred in confirming the duty. Accordingly, he prays for setting aside the duty confirmed by the impugned order.

7. The ld. DR relies on the impugned order. He further states that even subsequent to the date of inspection the appellant have not explained properly the variation in their records and physical stock found at the time of inspection. As such when the appellate authority have confirmed the duty, penalty is automatic.

8. Having considered the rival contentions, I find that the manner of stock taking on the date of inspection, have given an approximate figure of the stock and some variation is bound to happen. The question for consideration is whether the variation found is normal

calling for no adverse inference, or the variation is abnormal. In view of there being, no instance of any clandestine removal and nor there is found existence of ~~finding~~ fudging of the records, I hold that the discrepancy or ~~in~~ variation in the physical stock found, is a normal variation and does not call for any adverse inference. I further find that the appellant assessee also have not made any attempt to explain the variation found at the time of inspection, except alleging that there is discrepancy in the manner of stock taking. I also take note of the fact that the appellant have not protested the deposit of duty pursuant to investigation and maintained silence, till the issue of show cause notice. In this view of the matter I reduce the duty confirmed by 50% and further uphold the waiver of penalty by the ld. Commissioner (Appeals). Thus, the appeal of assessee is allowed in part and the appeal of revenue is dismissed.

(Dictated and pronounced in the open Court)

Sd/-
(ANIL CHOUDHARY)
MEMBER (JUDICIAL)

mm

अभिप्रमाणित प्रति / Certified True Copy
21.1.16
सहायक पंजीकार / Asstt. Registrar
सीमाशुल्क, उत्पादशुल्क एवं सेवा कर
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