FAX : 0532-2400149 REGISTERED / AD

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
38,MG Marg Civil Lines,Old Red Building,Allahabad-211001
Regional Branch, Allahabad

Dated: 01/12/2017

To

Appellant as per address in table below

Respondent as per address in table below

Final Order No. A/71748-71756/2017-EX[DB] dated 08/06/2017

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/58519/2013	**Garg Industries** B-18,sector-8 NOIDA U.P
2	E/58520/2013	**Deepak Hinges Pvt Ltd** B-150,sector-6 NOIDA U.P
3	E/58521/2013	**B M Garg** C-16,green Park Extension NEW DELHI NEW DELHI
4	E/58522/2013	**Jai Hardware Pvt Ltd** A-51,sector-4 NOIDA U.P
5	E/58523/2013	**D D Hardware Pvt Ltd** B-25,sector-8 NOIDA U.P
6	E/58524/2013	**Doordevices Manufacturing Vo** C-34-35,sector-8 NOIDA U.P
7	E/58525/2013	**D P Garg Exports Pvt Ltd** F-127,sector-8 NOIDA U.P
8	E/58526/2013	**Krishna Kumar** Resident Of Otpc Colony FARIDABAD HARYANA
9	E/58536/2013	**Monica Steels Pvt Ltd** A-56,sector-8 NOIDA U.P

Name and Address of Respondent

10 C.C. & C.E. & S.T.-Noida
C-56/42...SECTOR 62,
NOIDA,
UTTAR PRADESH-201307

11 C.C. & C.E. & S.T.-Noida
C-56/42...SECTOR 62,
NOIDA,
UTTAR PRADESH-201307

12 C.C. & C.E. & S.T.-Noida
C-56/42...SECTOR 62,
NOIDA,
UTTAR PRADESH-201307

13 C.C. & C.E. & S.T.-Noida
C-56/42...SECTOR 62,
NOIDA,
UTTAR PRADESH-201307

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C-56/42...SECTOR 62,
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UTTAR PRADESH-201307

15 C.C. & C.E. & S.T.-Noida
C-56/42...SECTOR 62,
NOIDA,
UTTAR PRADESH-201307

16 C.C. & C.E. & S.T.-Noida
C-56/42...SECTOR 62,
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C-56/42...SECTOR 62,
NOIDA,
UTTAR PRADESH-201307

18 C.C. & C.E. & S.T.-Noida
C-56/42...SECTOR 62,
NOIDA,
UTTAR PRADESH-201307

Other Appellants and Respondents as per Annexure

Copy To

19 Advocate(s) / Consultant(s):

**Rupesh Kumar (Adv.) &
Pravesh Bahuguna (Adv.)
F - 12A, (L.G.F) Kailash
colony,
New Delhi,
Delhi
110048**

20 Bar Association, CESTAT, Allahabad

21 Director Publications, Customs, Excise. I.P. Estate, Delhi

22 M/s Centax Publications Pvt. Ltd., 1512-B, Bhishm Pitamah Marg, Opp ICICI Bank of Defence Colony New Delhi-3

23 Company Law Institute of India Pvt. Ltd., No.2 (old no.36), Vaithyaram Street, T. Nagar, Chennai-17

24 Taxmann Allied Service Pvt. Ltd., 59/32, New Rohtak Road, New Delhi-110005

25 LAWCRUX Advisors Pvt. Ltd., LAW House, 1-8, Sector-10, Faridabad 121003 (Haryana)

26 TaxIndiaOnline.com Pvt. Ltd., 2nd Floor, Vasant Arcade, Vasant Kunj, New Delhi - 110070

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

28 The ICFAI society, 52, Nagarjuna Hill,Punjagutta Hyderabad.-500082

29 M/S Knowledge Processing Pvt. ltd.(taxmanagementindia.com),FF-19,1st Floor,Cross River Mall,CBD Ground,Near Karkardooma Court,Delhi-110032

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Asstt. Registrar

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH : ALLAHABAD
COURT No. I

APPEAL Nos. E/58519-58526 & 58536/2013-EX[DB]

(Arising out of Order-in-Original No. 73-81/Commissioner/Noida/2012-13 dated 31/03/2013 passed by Commissioner of Central Excise, Service Tax & Customs, Noida)

M/s Garg Industries (in Appeal No. E/58519/2013),

M/s Deepak Hinges Pvt. Ltd. (in Appeal No. E/58520/-2013),

Shri B.M. Garg (in Appeal No. E/58521/2013),

M/s Jai Hardware Pvt. Ltd. (in Appeal No. E/58522/2013),

M/s D. D. Hardware Pvt. Ltd. (in Appeal No. E/58523/2013),

M/s Doordevice Manufacturing (in Appeal No. E/58524/2013),

M/s D.P. Garg Exports Pvt. Ltd. (in Appeal No. E/58525/2013),

Shri Krishna Kumar (in Appeal No. E/58526/2013) &

M/s Monica Steels Pvt. Ltd. (in Appeal No. E/58536/2013) **Appellant(s)**

Vs.

Commissioner of Central Excise, Noida **Respondent(s)**

Appearance:

Shri Rupesh Kumar (Advocate) & Shri Pravesh Bahuguna (Advocate) for Appellant(s)

Shri Rajeev Ranjan (Joint Commr.) AR for Respondent(s)

CORAM:

Hon'ble Mr. Anil Choudhary, Member (Judicial)
Hon'ble Mr. Anil G. Shakkarwar, Member (Technical)

Date of Hearing : 08/06/2017
Date of Pronouncement :

FINAL ORDER NOs- 71748-71756/2017

Per: Anil Choudhary

The issue in these nine appeals filed against common Order of adjudication No. 73-81/Commissioner/Noida/2012-13 dated 31 Mach, 2013 is whether the impugned order have been passed validly under jurisdiction and powers vested under the Central Excise Act.

2. Brief facts of the case are that there was a search in the premises of the appellant's on 22 February, 2007. It appeared to Revenue that the appellant firms which were owned by or closely held by the Garg family headed by one Shri B.M. Garg, were engaged in the manufacture of Hinges and other hardware articles. Shri B.M. Garg was the proprietor of Garg Industries and was also partners/director in some of the aforementioned appellants companies which had been allegedly created artificially, as separate entities, so as to fragment the value of clearances of excisable goods manufactured and cleared from Garg Industries, in order to wrongly avail the benefit of SSI exemption and thereby evade payment of Central Excise Duty in contravention of the provisions of the Act and the Rules. It appeared to Revenue under the facts and circumstances that appellant company's was only a facade created so as to give the impression that these are separate and independent entities, but in fact the said units are nothing but an extension of M/s Garg Industries, the proprietorship concern of Shri B.M. Garg. Accordingly, show cause notice dated 20.02.2008 (addressed to Garg Industries, B.M. Garg & Krishan Kumar) was issued proposing recovery of duty of Rs. 1,70,51,187/- as duty not paid/short paid on the excisable goods manufactured and cleared by them (all

together) during the period February, 2003 to December, 2007 by wrongly availing of SSI exemption with further proposal to appropriate the amount of Rs. 40 lakhs, already deposited during investigation plus some other demands were also raised of smaller amount of less than Rs. 2 lakhs on the allegation of shortage of finished goods or some other discrepancy. Further it was proposed to confiscate seized goods valued at Rs. 11,91,700/- loaded in truck number HR 38-A/4705 recovered from the premises B-150, Sector 6, Noida and alleged to be cleared clandestinely from the factory premises of Garg Industries with further proposal that the quantity of excisable goods seized at various premises of Garg Group of Industries, valued together at Rs. 95,57,046/- be not confiscated with further proposal to impose penalty and also proposal for confiscation of seized truck valued at Rs. 3 lakhs which had been utilized for alleged clandestine removal.

3. The SCN was adjudicated on contest by the Commissioner, Central Excise, Noida vide Order-in-Original No. 16/Commissioner/Noida/2009 dated 30 March, 2009 vide which the aforementioned proposed demand of duty was confirmed alongwith confiscation and further penalties were imposed. This show cause notice and Order-in-Original related to only Garg Industries, Shri B.M. Garg and Krishan Kumar who preferred appeal before this Tribunal.

4. In the meanwhile the other appellants now before this Tribunal, namely Monica Steel Private Ltd, D.D. Hardware

Private Ltd, Deepak Hinges Private Ltd, Doordevices manufacturing company, Jai Hardware Private Ltd and D.P. Garg Export Pvt. Ltd. challenged the seizure of their goods made by the aforesaid Order-in-Original on the grounds of non-issue of show cause notice to them by filing writ petitions before Hon'ble Allahabad High Court against confiscation of their goods without making them necessary party in the aforementioned show cause notice. The Hon'ble High Court dismissed the writ petitions, observing that – "We find no infirmity in the impugned order. The petition is devoid of substance. All the petitions are therefore dismissed."

5. Being aggrieved with the order of the Hon'ble High Court the aforementioned Monica Steel Private Ltd and others moved in further appeal before Hon'ble Supreme Court by filing SLP No. 10381 of 2010 & others.

6. However, in the course of proceeding before Hon'ble Supreme Court, the respondent Department filed a letter dated 18 August, 2011 informing its decision to withdraw the Order-in-Original dated 30 March, 2009. The relevant portion of the same is reproduced hereunder: –

"... that a copy of the said Show Cause Notice dated 21.02.2008 together with an addendum if any, shall be served within a period of four weeks hereof on the petitioner and such other persons from whom the seizure were effected; that they can be granted an opportunity to reply to the Show Cause

Notice/Addendum and produce whatever material they would choose in answer to the Notice in their defence and that after grant of an opportunity of personal hearing, fresh order shall be passed within a period of six months adjudicating the above-mentioned show cause notice subject to the petitioner co-operating with the department to adhere to the time limit stated and they do not seeking any unavoidable adjournments."

7. The Hon'ble Supreme Court taking into consideration the letter dated 18 August, 2011, disposed of the SLP by observing that nothing survives in the said petitions as the Order-in-Original dated 30 March, 2009 has been decided to be withdrawn. Accordingly, the Hon'ble Supreme Court passed the following order dated 19 August, 2011: –

"Counsel appearing for the respondents (department) on instructions which are placed on record, states that the department had taken a decision to withdraw the Order-in-Original dated 30.03.2009.

Since the Order-in-Original dated 30.03.2009 is being withdrawn, practically nothing survives in these matters.

We grant permission to the respondent/department to withdraw the said order. It is, however, made clear that further action, if any, could be proceeded with in accordance with law.

The petition stands disposed of in terms of the aforesaid order."

8. Accordingly, the respondent-Revenue on 14 September, 2011 withdrew the Order-in-Original dated 30 March, 2009. Consequently, the pending Appeal Nos. 2055, 2053 and 2057/2009 filed by Shri. B.M. Garg, Garg Industries and Shri Krishna Kumar were disposed of by this Tribunal, holding the same as infructuous, as the Order-in-Original under challenge itself was withdrawn by the Adjudicating Authority vide Final Order of the Tribunal dated 15 September, 2011.

9. Thereafter, separate addendums were issued dated 16 September, 2011, on the other appellants herein namely, Monica Steel Private Ltd, D.D. Hardware Private Ltd, Deepak Hinges Private Ltd, Doordevices manufacturing company, Jai Hardware Private Ltd and D.P. Garg Export Pvt. Ltd. requiring them to show cause as to why –

The clearances made from their respective promises during the period 2001-2002 to December, 2007 be not clubbed with the value of clearances made by 'Garg Industries', during the said period, holding them to be dummy units of Garg Industries for the purpose of SSI Notification No. 8/2002-CE, as amended from time to time. Further required to show cause as to why the stock of excisable goods seized at their respective promises, been deemed to be belonging to Garg Industries and, therefore, be not held liable to be confiscated under Rule 25 of CER, 2002 with further proposal to impose penalty under Rule 25 of CER, 2002. Thereafter, giving opportunity of hearing to the appellants, the present impugned Order-in-Original was passed, demanding Central Excise Duty of Rs. 1,70,51,187/- from M/s Garg Industries, Noida, alongwith interest for the period February, 2003 to December, 2007 holding that they have wrongly availed SSI exemption, the clubbing the turnover of all these appellants with further appropriation of Rs. 40 lakhs paid during investigation. Further demand of Rs. 6,109/- was confirmed against Garg Industries on some shortage of finished goods found during inspection, further, a sum of Rs. 6,109/-, already debited in the Cenvat Account was appropriated. Further duty of Rs. 9,743/- as proposed was confirmed against the Garg Industries involved on the goods allegedly removed clandestinely. Further, demand of duty Rs. 1,94,485/- was also confirmed against Garg Industries being goods found loaded on truck number HR– 38-A/4705 valued at Rs. 11,91,700/-. Further, ordering vacation of the seized quantity of excisable goods valued at Rs. 11,91,700/-, further ordering confiscation of goods valued at Rs. 83,65,346/- in terms of Rule 25 of CER, 2002, seized from the different premises of the appellants herein and considered aggregating the same in the hands of Garg Industries as proposed in the addendum dated 16 September, 2011. Further option to redeem was given to the Garg Industries, Monica Steel Private Ltd, DD Hardware Private Ltd, Deepak Hinges Private Ltd, Doordevices Manufacturing Company, Jai Hardware Private Ltd and D.P. Garg Exports Ltd. jointly and severally to redeem the same on payment of fine Rs. 20 lakhs. Further penalty of Rs. 1,72,61,524/- was imposed on Garg Industries under Rule 25 of CER, 2002 read with Section 11 AC of the Act. Further penalty of Rs. 30 lakhs was imposed on Shri B.M. Garg under Rule 26 of CER, 2002. The truck no. HR 38-A/4705 owned by Shri Krishna Kumar valued at Rs. 3 lakhs was also confiscated with option to redeem on payment of redemption fine Rs. 5000/- and as the truck was provisionally released on deposit of security Rs. 5000/- and bond, the amount of security was appropriated. Further, penalty was Rs. 50,000/- was imposed on Shri Krishna Kumar, the transporter under Rule 26 of CER, 2002.

10. Assailing the impugned Order-in-Original, Shri Rupesh Kumar, advocate appearing for all the appellants have made the following submissions: -

(i) There is no provision under Central Excise Act to adjudicate same Show Cause Notice twice against assessees who are parties to the said Show Cause Notice.

(ii) With regard to the order dated 19.08.11 of the Hon'ble Supreme Court whereby permission was granted to the Department to withdraw the Order-in-Original dated 30.09.09 his submission is that M/s Garg Industries and the two individual were not party before the Hon'ble Supreme Court, so no leave or permission can be said to be obtained against them which further gets clarified from the order of the Hon'ble

Supreme wherein it was specifically stated that "further action, if any, could be proceeded with in accordance with law". His submission is that the phrase "in accordance with law" would only mean in accordance with the statutory provisions or in accordance with the law as interpreted in the binding judicial precedents. In support of his submission, Learned Counsel has relied upon the decision of the Hon'ble Supreme Court in the case of Collector of Central Excise Versus Modella Steels & Alloy – 1997 (96) ELT 20 (SC).

(iii) By referring to the principles referred to in Order XXIII Rules, 1, 3 and 4 of CPC, the Learned Counsel submitted that while withdrawing the Order-in-Original dated 30.09.2009, no permission or leave was obtained either from the Hon'ble Supreme Court or from this Tribunal, to re-adjudicate the SCN dated 20.02.08 against Garg Industries or Shri B. M. Garg or Shri Krishna Kumar. According to the Learned Counsel, the Department has 'abandoned' its right to proceed against the said three appellants. In support of the said plea, the Learned Counsel has relied upon the decision of the Hon'ble Supreme Court in the case of Sarguja Transport Service Vs State Transport Appellate Tribunal, M. P., Gwalior & Ors – (1987) 1 SCC 5.

(iv) Reliance was also placed on the decision of this Tribunal in the case of Collector of Central Excise, Belgaum Versus Modern Mills Ltd., Hubli – 1986 (23) ELT 183 (T) wherein it has been held that there is no provision in the

Central Excise Act, under which the adjudicating authority, having passed an order under the law, can cancel it and initiate fresh proceedings arising from the same SCN until and unless leave is obtained from the higher authority/Court.

(v) It was also submitted that once the Order-in-Original dated 30.03.2009 is passed by the adjudicating authority against the three appellants while adjudicating the SCN issued to the said three appellants, the said SCN issued to the said three appellants merged with the Order-in-Original passed against them and, thereafter, no SCN was available for fresh adjudication. In support of this plea, the Learned Counsel relied upon the decision of the Hon'ble Andhra Pradesh High Court in the case of Vuppalamritha Magnetic Components Ltd. Vs DRI (Zonal Unit), Chennai - 2017 (345) ELT 161 (AP).

(vi) The Learned Counsel also referred to the Stay Order dated 20.02.14 passed by the Tribunal in the present appeals whereby direction was issued to the department to file an affidavit stating the particulars of the authority who passed order of withdrawal. He submitted that pursuant to the said directions, one affidavit dated 25.03.14 was filed on behalf of department by Smt. Shalinee Sharma, Assistant Commissioner, Central Excise Division-III and, another affidavit dated 09.12.16 was filed by Shri Syed Vaseem Hasan, Principal Commissioner, Central Excise Commissionerate, Noida-I, pursuant to the directions of the

Tribunal during the course of subsequent hearing. However, in none of the two affidavits, the department could either state the source of power for such withdrawal nor dispute or deny the fact that Garg Industries and the two individuals were not parties to the proceedings before the Hon'ble Supreme Court.

(vii) Clubbing of clearances in not permissible in the facts of the present case in as much as Garg Industries has not availed any SSI benefit on the excisable goods manufactured by it and the brand names in question are not owned either by Garg Industries or by Sh. B.M. Garg. The other appellants viz., companies/firms are independent entities having separate Sales Tax registration, independent infrastructure facilities, plants, machineries, etc. Extended period of limitation is also not invokable in the present case.

(viii) Redemption fine is not imposable as the goods were released by the department unconditionally and therefore, were not available for confiscation so as to redeem by paying redemption fine.

Accordingly, the learned Counsel prayed for allowing the appeals and setting aside the impugned order.

11. The learned Joint Commissioner A.R. Shri. Rajeev Ranjan defending the impugned order states that fresh adjudication of SCN have taken place as per permission granted by Hon'ble Supreme Court, and in support, he relied upon the contents of the two affidavits filed by the officers of

the Department in compliance with the directions of this Tribunal.

12. We have considered the rival contentions and upon perusal of the records. For the sake of convenience, we are taking up Appeal No. E/58519/2013 (Garg Industries) first. The entire case of the appellant M/s Garg Industries is that the SCN dated 20 February, 2008 was adjudicated earlier vide Order-in-Original dated 30 March, 2009. The said Order-in-Original having been withdrawn by the Department, in the appeal/proceedings before Hon'ble Supreme Court wherein the said appellant was not even party, the permission obtained for fresh adjudication will not apply in its case. It amounts to abandoning the right of the Department, so far as the appellant M/s Garg Industries are concerned. We are prima facie of the view that withdrawal of the earlier adjudication order dated 30 March, 2009, without reserving liberty to proceed from the stage subsequent to the stage of the show cause notice dated 20 February, 2008 against M/s Garg Industries and of other concerned parties, we find no lawful authority for proposing a fresh adjudication order viz., the impugned order. We agree with the contentions of the appellant that in view of the withdrawal of the earlier adjudication order without reserving liberty to proceed from the stage of the SCN dated 20 February, 2008 against Garg Industries, we find no lawful authority for passing fresh Order-in-Original, being the impugned order. We hold that

the Commissioner is not correct in passing a fresh Order-in-Original dated 31 March, 2013, in respect of the same subject matter for the same period, since the earlier Order-in-Original dated 30 March, 2009 was withdrawn in the separate proceedings, in which some of the present appellants were not even party. Therefore, there was no question of seeking permission from the Hon'ble Supreme Court in the case of appellant-M/s Garg Industries to pass a fresh adjudication order. During the course of arguments, specific question was put to the learned AR as to whether any permission was sought from the Hon'ble Supreme Court to against Garg Industries and two individuals, who were not even parties before the Apex Court, and if so, to file affidavit of the senior officer in the Department. Pursuant to the directions, affidavit dated 9 December, 2016 was filed by the Principal Commissioner, Central Excise Commissionerate, Noida. However, the said affidavit is also silent on this vital aspect. Further, the order of the Hon'ble Supreme Court dated 19 August, 2011, which have been made basis for passing a fresh adjudication order against Garg Industries & others, does not grant unconditional permission to withdraw the earlier adjudication order. The said order categorically states that further action could be proceeded with "in accordance with law", which would mean as per the provisions of law, as held by the Apex Court in the case of Collector of Central Excise vs. Modella Steels and Alloy reported at1997 (96) ELT

20 (SC) to mean as interpreted in the binding precedents to pass a fresh adjudication order. During the course of arguments, a specific question was put to the learned AR as to whether any permission was sought from the Hon'ble Supreme Court to proceed against. We further notice that there is no power, authority or jurisdiction consecrated under the provisions of the Excise Act, 1944 enabling withdrawal of an adjudication order, and that no power is vested in hands in the Adjudicating Authority to review its own order either. It is also not clear from the record as to which authority withdrew the Order-in-Original dated 30 March, 2009 and in exercise of which powers. We further find that the appellant's counsel have rightly placed reliance on the ruling of Supreme Court in the case of Sarguja Transport Service vs. State Transport Appellate Tribunal, M.P., Gwalior and others reported at (1987) 1 SCC 5, wherein it has been held as under: –

"......The principle underlying Rule 1 of Order XXIII of the Code of civil procedure is that when a plaintiff once institutes a suit in a court and thereby avails of a remedy given to him under law, he cannot be permitted to institute a fresh suit in respect of the same subject matter again after <u>abandoning</u> the earlier suit or by withdrawing it without the permission of the Court to file fresh suit. Invito beneficium non datur. The law confers upon a man no rights or benefits which he does not desire.

Whoever waives, abandons or disclaims a right will loose it............In the case of abandonment or withdrawal of a suit without the permission of the Court to file a fresh suit, there is no prior adjudication of a suit or an issue is involved, yet the Code provides, as stated earlier, that a second suit will not lie in sub-rule (4) of Rule 1 of Order XXIII of the Code when the first suit is withdrawn without the permission referred to in sub-rule (3) in order to prevent the abuse of the process of the Court."

13. Applying the ratio of the Apex Court in the case of Sarguja Transport Service (supra), we hold that by withdrawing the earlier Order-in-Original dated 30 March, 2009, which was passed again Garg Industries and two individuals, without obtaining permission to pass fresh adjudication order against them, would amount to abandoning the proceedings against the said three parties. There is no provision under the Central Excise Act, 1944, which grants power to the Adjudicating Authority to re-adjudicate the SCN on same facts for same period relating to same clearances once again, the said SCN already having been adjudicated upon by passing of Order-in-Original dated 30 March, 2009. In our opinion, the re-adjudication proceedings of the same SCN dated 20 February, 2008 along with addendums and passing of the present Order-in-Original impugned hearin is not saved by order dated 19 August, 2011

of the Hon'ble Supreme Court, so far the Garg Industries and the two individuals, namely, Shri B.M. Garg and Shri Krishna Kumar are concerned.

14. We, further, note that upon adjudication of the SCN dated 20 February, 2008, vide earlier Order-in-Original dated 30 March, 2009, the SCN got merged with the said Order-in-Original and the SCN was no longer in existence. Once the said Order-in-Original was withdrawn, without leave, against Garg Industries and the two individuals, nothing survives for fresh adjudication in so far the said three parties are concerned. Accordingly, we set aside the impugned Order-in-Original dated 31 March, 2013. As regards M/s Garg Industries and the two individuals, namely, Shri B.M. Garg and Shri Krishna Kumar alongwith the confiscation of the seized truck number in question.

15. In so far the appeals filed by other appellants are concerned we find that the learned Commissioner has confiscated the excisable goods seized from the respective premises of these appellants in terms of Rule 25 of CER, 2002 and gave option to M/s Garg Industries and also these appellants to redeem the same on payment of redemption fine in lieu of confiscation. However, we find that as per Section 34 of the Act, redemption fine can be imposed only if the goods are available for confiscation. In the present case, pursuant to order dated 14 September, 2011 - order of withdrawal of the Order-in-Original dated 30 March, 2009,

the Commissioner has already unconditionally released the seized goods to the respective appellants from whose premises the same were seized. Therefore, no confiscation is possible, nor redemption fine can be imposed on the other appellants under the provisions of Section 34 of the Act. In sofar as the Garg Industries is concerned, no redemption fine could be imposed under the facts and circumstances.

16. Thus, we find that the impugned Order-in-Original is not sustainable in respect of all the appellants herein and accordingly, we set aside the same. All the appeals are allowed with consequential relief.

17. We make it clear that we have not examined the merits of the case regarding availability of benefit of Notification no. 8/2003 - CE as well as applicability of extended period of limitation in the present appeals. The said questions are left open.

(Pronounced in Court on 29/11/2017)

-Sd/-
(ANIL G. SHAKKARWAR)
Member (TECHNICAL)

-Sd/-
(ANIL CHOUDHARY)
Member(JUDICIAL)

Ankit

प्रमाणित प्रति/Certified True Copy
04/01/18
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