

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL**  
**PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066**  
**EXCISE APPEAL BRANCH**

Appeal No. E/2810/2004

Date 26/11/2007

Assistant Registrar  
C.E.S.T.A.T, New Delhi

To :  
M/S KILPEST INDIA LTD.  
7-C, INDL AREA GOVINDPURA BHOPAL M.P.

M/S KILPEST INDIA LTD.

Appellant

Vs

C.C.E BHOPAL

Respondent

I am directed to transmit herewith a certified copy of Final order No. *568/2007-EX* dated *26-9-07* passed by the Tribunal under Section 35-C(1) of Central Excises Act, 1944

*M S T*  
Assistant Registrar  
(Excise Appeal Branch)

**Copy to :**

1. Respondent  
C.C.E BHOPAL  
HOSHANGABAD ROAD, 48, ADMINISTRATIVE  
AREA, AREA HILLS, BHOPAL (M.P.) 462011
2. Adv. / Consult *SH. NAVEEN MULLICK, ADV.,*  
*C/O APPELLANTS*
3. ~~S.D.R.~~
4. ~~J.C.D.R.~~
5. Bar association, CESTAT, New Delhi
6. M/s. Deeparchi Publications, M-93, marg. 43, saket, New
7. M/s Centax Publications (P) Ltd., 1512-E, Bhishm Pitamah
8. Excise & Customs cases, B-37, Sector -1, NOIDA - 201301
9. R.Venkatraman Constt. 44-B, S.Suncity, Ghaziabad -
10. Nidheshak publications, I.P.Estate, new Delhi
11. Taxmann Allied Service Pvt Ltd., 21/35, West Punjabi Bagh,
12. Co, Law Institution
13. TAX INDIA, B-XI/8183, Vasant Kunj, New Delhi - 110070
14. Office Copy
15. Guard file

*M S T*  
Assistant Registrar  
(Excise Appeal Branch)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE  
TRIBUNAL, R.K. PURAM, W.B. NO.2, PRINCIPAL BENCH  
NEW DELHI, COURT NO. III**

**Excise Appeal No. 2810 of 2004**

[Arising out of order in appeal No. 99-CE/BPL/2004 dated 5.3.2004 passed by  
the Commissioner (Appeals) Central Excise, Bhopal]

**Date of Hearing/ Decision: 26.9.2007**

**For approval and signature:**

**Hon'ble Dr. T.V. Sairam, Member (Technical)**

**Hon'ble Mr. P.K. Das, 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 Their Lordships wish to see the fair copy of the Order?   | : | See |
| 4. Whether Order is to be circulated to the Departmental authorities?  | : | Yes |
- 

Kilpest (I) Limited

Appellants  
[Rep. by Mr. Naveen Mullick, Advocate]

Vs.

CCE, Bhopal

Respondent  
[Rep. by Mr. S.M. Tata, Authorized Representative (DR)]

CORAM: **Dr. T.V. Sairam, Member (Technical)**  
**Mr. P.K. Das, Member (Judicial)**

*Final* **ORDER** 568/2007EX

Per T.V. Sairam:

When the matter was called, nobody represented the appellant. In a letter dated 24.9.2004, the appellant company had informed this Tribunal that they are unable to appear for hearing because of financial constraints and hence, the Tribunal may take note of their written submissions on record and allow the appeal.

2. After hearing the Id. Departmental Representative and perusing the records, we find that the main issue was that the appellant was clearing their goods from their factory on the basis of prices at which goods were sold in their depots. Between the time the goods were cleared in the factory and the same were sold from the depot, there was admittedly fluctuation in price, both on higher as well as on lower sides. The Department has taken note of the higher price at which the appellant were selling their goods from depots thereby demanding the differential duty imposed on them. It was argued by Id. DR that had the appellant claimed refund in respect of the lower price at which the goods were sold by them from their depots in time, the Department would have considered the matter in their favour. It was also contended that in any case, the appellant had not brought out the fact that they had sold at depot price below the price at which they cleared the goods from their factory gate. A sum of Rs. 4,076/- demanded here relates to debit note dated 31.3.96. It was the contention of the appellant that as the debit note itself will show that the same pertains to the period July to November 95, no duty was payable by them when the goods were cleared and that there can be no differential duty. However, no copy of the said debit note has been brought to our notice to ascertain whether the same pertains to the period July to November 1995.

3. As regards the demands relating to Rs.7,507/- we find that the appellant could have resorted to provisional assessment had they found that the prices would go up at the time of final clearance from their depots. As they have not resorted to this, in our opinion, they cannot claim that no differential duty could be charged by the department.

4. As regards Rs,5,713/- which pertains to debit note issued to supplier of inputs, the Id. Commissioner has observed the following:-

*“As regards the debit note for Rs.5,713/-, duty is demandable on the amounts realized as dutiable goods were given in exchange of some duty paid goods returned by their customer and modvatable inputs have been utilized even when they stood rejected. Hence, duty liability exists on such realized amounts being includible in the assessable value.”*

5. As regards the imposition of penalty, ld. DR states that there is a clear violation of Rule 173Q in this case and in the show cause notice, it is observed that the appellants are liable for penalty under Rule 57AH of the Rules and Section 11 AC of the Act.

6. After hearing the ld. DR and perusing their case papers, we do not find any inadequacy in the order of the ld. Commissioner (Appeals) insofar as the demand of duty is concerned. However, we notice that even the Central Board of Excise and Customs vide letter dated 14.10.96 has acknowledged the possibility of prices fluctuating in such circumstances. To this extent, we are not much impressed with the contention that there was *mens rea* on the part of the appellant company to evade payment of excise duty. According to the ld. DR overall events would indicate that the appellants have removed the excisable goods in contravention of the provisions of the Rules particularly Rule 52 A of the Central Excise Rules. According to held DR, Rule 52 A and Section 4 stands violated in this case inasmuch as the appellant company while clearing the goods from their depot have charged in certain cases prices higher than the prices of the goods charged at the time of clearance from their factory, thus causing loss to the Exchequer.

7. Having regards to the facts and circumstances of the case, we find that the duty demanded under the impugned order holds goods and the same is hereby upheld. However the penalty imposed, in our opinion, is not called for here because the violation of any specific provisions by the appellant has

not been brought out clearly in the show cause notice particularly when the Board itself has recognized fluctuation in prices. As no *mens rea* is noticed on the part of the appellant, the penalty imposed under the impugned order is fully set aside. The impugned order is modified in the above terms. The appeal is disposed of accordingly.

Order dictated & pronounced in open court on 26.9.2007.

( Dr. T. V. Sairam )  
Member (Tech I)

( P.K. Das )  
Member (Judicial)

Ckp.