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

Date 09/03/2009

Appeal No. E/4148/2004,5016/2004-5017/2004 - EX[DB]

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

To :
M/S WOODBURN CHEMICALS (P) LTD.,
D-5, INDL. AREA, SITE-I, UNNAO
M/S WOODBURN CHEMICALS (P) LTD.,

Appellant
Vs
Respondent

C.C.E. KANPUR

I am directed to transmit herewith a certified copy of **Final order No.** 211 - 213/2009- **EX[DB]** dated 26-2-09

passed by the Tribunal under Section 35-C(1)of Central Excises Act, 1944

Assistant Registrar
(Excise Appeal Branch)

Copy to :
1. Respondent
   C.C.E. KANPUR
   117/7 SARVODYA NAGAR, KANPUR
2. Adv. / Consult
   ~~MR AMIT AWASTHI~~
   ~~113/145, SWARUP NAGAR, KANPUR-208002~~
   SH. BIPIN GARG, ADV.,
   B-1/1289-A, VASANT KUNJ,
   N. DELHI-70

3 S.D.R
~~4 J.C.D.R.~~
5 Bar association, CESTAT, New Delhi
6 M/s. Deeparchi Publications, M-93, Marg. 46, Saket, New Delhi 110017
7 M/s Centax Publictions (P) Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New - 3
8 Excise & Customs cases, B-37, Sector -1, NOIDA - 201301 Gautam Budh Nagar, (U.P.)
9 Raghuraman's 44-B, Regal Flat,Shipra Suncity, Indirapuram - 201010,Ghaziabad, DT, U.P.
10 Nidheshak publications, I.P.Estate, new Delhi
11 Taxmann Allied Service Pvt Ltd., 21/35, West Punjabi Bagh, New Delhi - 110026
12 Commercial Laws of India Pvt Ltd Post Bag No. 1033, No.70(Old No. 88), Thyagaraya Road, T. Nagar,Chennai
13 Taxindiaonline.com Pvt.Ltd, B-XI/8183,Vasant Kunj, New Delhi - 110070
14 Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road,Ahmedabad-15
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Assistant Registrar
(Excise Appeal Branch)

17. M/S S.C. MANUFACTURER
D-4, INDL. AREA, SITE-I, UNNAO

18. M/S SPHENAX INDS. (INDIA) UNNAO
D-6, INDL. AREA, SITE-I, UNNAO

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

West Block No.2, R.K.Puram, New Delhi

COURT-III

Date of hearing/pronouncement: 26.2.2009

Central Excise Appeal Nos.4148, 5016 – 5017 of 2004

Arising out of the order in original No.04/Commr./MP/2004 dated 25.3.2004 passed by Commissioner of Central Excise, Kanpur.

For Approval and Signature:

Hon'ble Mr. M. Veeraiyan, Member (Technical)
Hon'ble Mr. P.K. Das, Member (judicial)

1	Whether Press Reporter 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 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?	Seen
4	Whether Order is to be circulated to the Departmental authorities?	Yes

Appellants — Respondent

1. M/s Woodburn Chemicals (P) Ltd.
2. M/s Sphenax Industries (India)
3. M/s S.C. Manufacturer

vs.

C.C.E., Kanpur

Appearance:

Shri Bipin Garg, Advocate with Shri Atul Gupta, C.S. for the appellants
Shri C.S. Rajput, Authorized Departmental Representative (DR) for the Revenue

Coram : Hon'ble Mr. M. Veeraiyan, Member (Technical)
Hon'ble Mr. P.K. Das, Member (Judicial)

FINAL Order No. 211-213/09-EX.

Per M. Veeraiyan:

These three appeals arise out of a common order in original which was passed in pursuance of the order in remand of the Tribunal dated 7.2.2002. These appeals are, therefore, being disposed of by a common order.

2. Heard both sides.

3. The relevant facts, in brief, are as follows:

a) M/s Woodburn Chemicals Pvt.' Ltd. (WCPL) with Shri D.S. Sodhi as Managing Director and a partnership firm by name, S.C. Manufacturer (SCM) with Shri D.S. Sodhi as one of the partners, and a proprietary concern by name Sphenax Industries (India) (SII) with Shri D.S. Sodhi as proprietor are situated in adjacent plots and all were managed by Shri D.S. Sodhi. They were manufacturing basic chromium sulphate and by-product, by name, sodium sulphate. "WPCL" is a brand name belonging to Woodburn Chemicals Pvt. Ltd. and admittedly, the other two firms were also using the brand name till 31.3.94 and all the three units were availing the benefit of smalls scale exemption separately.

b) On 7.9.94, a truck coming out of WCPL was intercepted and found to contain 300 bags of chemicals out of which 4 bags were shown as manufactured by SCM and 45 bags were shown to have been manufactured by SII. On a follow-up, 372 unstitched filled bags of chemicals were found in the premises of WCPL out of which 90 bags were showing as if manufactured by SCM and 15 bags as if manufactured by SII.

c) Commissioner held that the firms SCM and SII both have cleared chemicals during the period from 1.4.94 till 31.3.94 with the brand name of WCPL making them ineligible to SSI exemption in view of amendment to Notification No.1/93-CE, dated 28.2.1993 with effect from 1.4.94 and accordingly, confirmed a demand of Rs.8,41,764/- from SCM and Rs.9.24,584/- from SII. There was shortage of one raw materials namely, soda ash in each of the three units. He held that the same have been used in the manufacture of final product and the final product have been clandestinely removed and demanded duty amounting to Rs.1,29,477/- from WCPL, Rs.3,81,933/- from SCM and Rs.4,15,044/- from SII. He imposed a penalty of Rs.1,38,533/- under Rule 173Q on WCPL only and penalty on other firms were not imposed as partners, proprietor have since expired.

4.1 Learned Advocate submits that they were availing the benefit of exemption under Notification No.1/93 till 31.3.94 in respect of clearances from SCM and SII. The goods contained in the truck intercepted and the goods found in 372 bags lying in WCPL were manufactured only by WCPL. The old bags which contained inscription "manufactured by SCM" and "Manufactured by SII" were mistakenly used by the illiterate labourers. No other evidences have been relied upon to support the allegation that SCM and SII have manufactured any goods with the brand name WCPL and cleared. He also submits that even for period after date of visit that is 7.9.94, the demand has been raised treating the clearances effected from SII and SCM as if containing the brand name WCPL without seeking any clarification from the representatives of these firms.

4.2 On the issue of shortage of soda ash, he submits that for manufacture of the chemicals raw materials like chromium ore- 46% and lime 26% were required in addition to soda ash constituting 28%. There was no shortage of other raw materials noticed. The Commissioner came to a finding that merely on the basis of shortage of one of the raw materials, certain quantities of finished products were manufactured by each of three units and clandestinely removed and such a finding should not be sustained. He fairly submits that Cenvat credit has been taken by them of the duty on the soda ash which was found short. As regards penalty on WCPL, he submits that the same is not sustainable as there is no evidence of any unaccounted manufacture of the chemicals and clearance of the same as alleged. Further, "WCPL" is a brand name owned by them and there was no violation of the condition of Notification 1/93-CE in so far as clearances by the company WCPL is concerned.

4.3 He is not disputing the findings of the Commissioner in regard to the demand confirmed by him in respect of other issue.

5. Learned DR submits that the existence of 4 bags and 45 bags in the 300 bags seized from the truck containing the inscription that they were manufactured by SCM and SII respectively and also the presence of such bags in 370 bags found in WCPL should be taken as sufficient circumstantial evidence to hold that SCM and SII have manufactured goods with the brand name WCPL and cleared them wrongly availing the benefit of exemption Notification No.1/93. He also submits that there is a clear admission of the use of soda ash which was found short which leads to inescapable conclusion that the goods have been

manufactured and cleared , therefore, duty demand on this count should also be upheld. He also submits that WCPL is liable to penalty.

6.1 We have carefully considered the submissions from both sides. The issues which arose in de novo proceedings before the Commissioner were as follows:

"(i) Whether M/s SCM and M/s SII have wrongly availed the benefit of Notification No.1/93 dated 28.3.93 during 1994-95 as they were using brand –name of another person (WCPL) and have thus evaded Central Excise duty amounting to Rs.8,41,764/- and Rs.9,24,584/- respectively.

ii) Whether the quantities of soda ash found short at the time of physical stock verification on 7.9.94 at M/s WCPL, M/s SCM and M/s SII were used in the clandestine manufacture of basic chromium sulphate (BCS) and sodium sulphate which was subsequently removed clandestinely without payment of central excise duty and as such, whether they evaded central excise duty of Rs.1,29,477/- , Rs.3,81,933/- and Rs.4,15,044/- respectively.

iii) Whether M/s WCPL have clandestinely cleared higher quantity of BCS and sodium sulphate as evidenced from their Income Tax returns, than the clearances reflected in their RG-I register and have thus evaded central excise duty of Rs,16,884/- during the years 1990-91 and 1991-92.

iv) Whether penalty is imposable on M/s WCPL , M/s SCM and M/s SII under erstwhile Rule 9(2), 52A, 173Q and 226 of the then Central Excise Rules, 1944 , and,

v) Whether penalty is imposable on Shri D.S. Sodhi, Shri R.K. Bajpai, Shri Diwakar Trivedi and Shri Pradeep Kumar Saxena under erstwhile Rule 209-A ibid for their involvement in the duty evasion."

6.2 The Commissioner decided the issues in para (i) and para (ii) against the appellants which are being contested. In respect of para (iii), the Commissioner has partly held against the appellants. However, the learned Advocate is not pressing this issue. In respect of para (iv) the Commissioner has imposed penalty only on WCPL which is being contested. In respect of para (v) no penalties have been sustained on any of them.

7. The findings that M/s SCM and M/s SII have manufactured goods with the brand name of WCPL from 1.4.94 to 31.3.95 are based only on presence of

a few bags, out of 300 bags seized from the truck and a few bags found in the finishing hall of WCPL. The explanation of the appellants are that they had stock of printed bags which were used prior to 31.3.94 and some of them have been mistakenly used by the illiterate workers. It is noticed that 370 bags were in the finishing hall of WCPL and the bags which were yet to be stitched and some of them contained the inscription that the same are manufactured by SCM and SII. This evidence , in our opinion, does not support the case of the Department. This supports the claim by the appellants that these goods were manufactured in WCPL only, even though inscription in some bags indicated as if manufactured by SCM and SII. No evidence has been let in to show that the goods contained in these bags were manufactured by SCM and SII. In the light of this, the discrepancy in respect of the bags contained in the truck is also to be analyzed. We find that the explanation by the appellant is acceptable in the absence of any other evidence to show that the goods were manufactured by SCM and SII with the brand name of WCPL for the period 1.4.94 to 31.3.95. Therefore, the demands against SCM and SSI on this issue as contained in para (i) above are not sustainable.

8. We find from the submission of the learned Advocate that for manufacture of finished products three raw materials soda ash – 28%, chrome ore - 46% and lime – 26% were required. The Commissioner, on the basis of shortage found in soda ash came to a conclusion that proportionate quantum of finished products have been manufactured and clandestinely removed. We do not agree with this findings in the absence of any other evidence to support the same. However, we hold that since soda ash, the raw material on which Cenvat credit was taken by the appellant was found short and the shortage was not satisfactorily accounted, they have to reverse/deposit the proportionate amounts towards Cenvat credit. Only where the demand is upheld, as held by the Commissioner, the reversal / payment of credit will not arise. Subject to the above, demand on the alleged excess production and clandestine removal in respect of these three units as mentioned in para (ii) above is set aside.

9. We find that the brand name WCPL belongs to Woodburn Chemicals (P) Ltd. No violation of the condition of Notification 1/93 is found against them. Further, we are not concurring with the finding of the Commissioner that WCPL has manufactured the goods and cleared them without bringing to the account and without payment of duty. We have only held that Cenvat credit availed in respect of raw materials found short should have to be paid. Under these circumstances, we do not find any justification in sustaining penalty.

10. In the light of the above, the 3 appeals are disposed of with the direction that the amount of Cenvat credit involved on soda ash found short shall be payable. No other demand or penalties are sustainable.

(Dictated and pronounced in open Court)

(M. Veeraiyan)
Member (Technical)

(P.K. Das)
Member (Judicial)

scd/