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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

Appeal No. E/3407/2004-3408/2004 - EX[DB]

Date 29/09/2009

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

To :
C.C.E. MEERUT-I
C.C.E., MEERUT I, UNIVERSITY ROAD, MANGAL
PANDEY NAGAR, MEERUT.

Appellant

C.C.E. MEERUT-I

Vs

Respondent

M/S CONTINENTAL CEMENT CO.

I am directed to transmit herewith a certified copy of **Final order No. 727-728/ 2009 EX[DB]** dated 08-9-09

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

Assistant Registrar
(Excise Appeal Branch)

Copy to :
1. Respondent
M/S CONTINENTAL CEMENT CO.
M/S CONTINENTAL CEMENT CO., JANSATH ROAD, DISTT. MUZAFFARNAGAR
2. Adv. / Consult SH. ANURAG RISHI, ADV.,
60, VILVESHWARPURI, BEHIND SADAR
THANA MEERUT CANTT
3 C.D.R
~~4 J.C.D.R.~~
5 Bar association, CESTAT, New Delhi
6 Director Publications, Customs, Excise. I.P. Estate, New Delhi
7 M/s Centax Publictions Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi - 3
8 Commercial Laws of India Pvt Ltd. Post Bag No. 1033, No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
9 Raghuraman's 44-B, Regal Flat,Shipra Suncity, Indirapuram - 201010,Ghaziabad, DT, U.P.
10 M/s Manupatra Information Solutions Pvt Ltd. Excise & Customs Cases B-37, Sector - 1, Noida - 201301, Gautam Budh Nagar, (UP)
11 M/s. Deeparchie Publications, M-93, Marg. 46, Saket, New Delhi 110017
12 Taxindiaonline.com Pvt.Ltd, B-XI/8183,Vasant Kunj, New Delhi - 110070
13 Taxmann Allied Service Pvt Ltd., 21/35, West Punjabi Bagh, New Delhi - 110026
14 Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road,Ahmedabad-15
15 LAWCRUX Advisors Pvt Ltd, LAW House,1-8,Sector - 10, Faridabad 121003 (Haryana)
16 Office Copy
17 Guard file
18. HON'BLE PRESIDENT.
19. SHRI AJIT KUMAR DIRECTOR OF M/S CONTINENTAL CEMENT
M/S CONTINENTAL CEMENT CO., JANSATH ROAD, DISTT.
MUZAFFARNAGAR

Assistant Registrar
(Excise Appeal Branch)

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI
PRINCIPAL BENCH, COURT NO. I

Excise Appeal No. 3407 - 3408 of 2004

[Arising out of the Order-in-Appeal No.189-192-CE/MRT-I/2004 dated 29.3.2004 passed by the Commissioner of Central Excise (Appeals), Meerut-I.]

For Approval and Signature:

Hon'ble Shri Justice R.M.S. Khandeparkar, President
Hon'ble Shri M. Veeraiyan, Member (Technical)

1	Whether Press Reporter may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	Yes
2	Whether it should be released under Rule 27 of CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	No
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

Excise Appeal No. 3407 of 2004

Commissioner of Central Excise — Appellants
Meerut I

Vs.

M/s Continental Cement Co. — Respondents

Excise Appeal No. 3408 of 2004

Commissioner of Central Excise — Appellants
Meerut I

Vs.

Shri Ajit Kumar, Director — Respondent

Appearance:

Shri B.K. Singh, Jt.CDR for the Appellants
None for the Respondent

CORAM:

Hon'ble Mr. Justice R.M.S. Khandeparkar, President
Hon'ble Mr. M. Veeraiyan, Member (Technical)

Date of Hearing/decision : 8.9.2009

FINAL **ORAL ORDER NO.** 727-728/09-Ex

Per Mr. Justice R.M.S. Khandeparkar (for the Bench):

Heard the learned Jt. CDR. None present for the respondent. The application by way of fax message has been received from Shri Anurag Rishi, advocate for the respondents seeking adjournment of the matter.

2. Having heard the learned Jt. CDR and having gone through the entire records, we find it appropriate to reject the application for adjournment and to dispose of the appeals on merits. Since the question of law and facts in both the appeals are common, they were heard together and are being disposed of by this common order.

3. Proceedings were initiated on the ground of clandestine removal of the goods by the respondents during the period from 9.2.93 to 27.9.95 (1992-93 to 1995-96) weighing about 3879.350 MT of ordinary -portland cement and involving central excise duty amounting to Rs. 7,20,154.75p by using parallel documents like GPIs, invoices, challans, Bills, cash memos and GRs, etc. The show cause notice was issued and after hearing the parties, the Additional Commissioner, Meerut confirmed the demand to the tune of Rs. 7,20,154.75 under erstwhile Rule 9(2) of the Central Excise Rules, 1944

read with the proviso to sub section (1) of Section 11A of the Central Excise Act, 1944 and also imposed penalty to the tune of Rs.3,50,000/- under Rules 9(2) and 173Q as the same stood at the relevant time read with Rule 209 of the Central Excise Rules, 1944 and also imposed penalty of Rs. 7,20,154.75p in terms of section 11AC of the said Act. Besides penalty to the tune of Rs.3,65,000/- under Rule 209 A of the Central Excise Rules was also imposed against each of the Directors namely, Shri Ajit Kumar, Shri Jagmohan Goel and Smt. Kamlesh Tayal. Being aggrieved, the respondents preferred appeal before the Commissioner (Appeals) which came to be allowed under impugned order dated 29.3.04. Hence, the present appeals.

4. On earlier occasions, the appeals were adjourned from time to time and as many as on three times on account of non-appearance of the advocate for the respondents. Ultimately, when the matter was taken up on 13.8.08, the Tribunal proceeded to dispose of the same in the absence of the respondents after going through the records on merits. Accordingly, by the said order the appeals were allowed. Thereafter, the respondents filed an application being ROA application No. 236-237/2008 in the above appeals for restoration thereof by recall of order dated 13.8.08. In fact the order dated 13.8.08 related to the disposal of four appeals. Two other appeals were by two other Directors namely, Jagmohan Goel and Smt. Kamlesh Tayal. Those Directors have not sought for restoration of their appeals. The application filed by these appellants were heard on 2.1.2009 and were allowed and their appeals were restored to Board. Thereafter the appeals came up for hearing on 17.2.09 but as none was present for the respondents,

the appeals were adjourned to 31.3.09, on which date at the request of the respondents representative, the appeals were adjourned to 2.6.09. The appeals were not listed for hearing on 2.6.09 but were listed on 20.7.09. However, the same did not reach for hearing on that date. The appeals were posted for hearing on 20.8.09 on which date the same were adjourned at the request of the advocate for the respondents with a clear intimation that such adjournment would be the last opportunity and no further adjournment would be granted to the respondents and accordingly the appeals were posted for hearing to this date. Today, again the application has been received for adjournment. If one peruses the records, we find that the number of adjournment applications which are stereo type, were filed by the advocate for the respondents from time to time. Even on the last date of hearing, the appeals were sought to be adjourned on the ground that the advocate was down with the fever with severe cough and cold and was suspected of flu like symptoms and had been kept in isolation, and that he was unable to appear and argue the matter. The application dated 20.8.09 and the one which is faxed today has been signed by Shri Anurag Rishi. Neither the application dated 8.9.09 nor dated 20.8.98 is accompanied by any medical certificate. In the circumstances, therefore, it is not possible to entertain any such application. Matters relate to year of 2004. The Tribunal has already on earlier occasion having disposed of the matters on account of failure on the part of the respondents to render necessary assistance in the matter and thereafter having recalled the said order and given fresh opportunity to the respondents to put forth their case, it was expected from the respondents to ensure the appearance of their representative to argue the matters on their behalf. Infact when the matters were adjourned on the last date of hearing, it was made very clear that under no circumstances matters would be adjourned any further. The request for adjournment, therefore, is rejected.

5. Referring to the merits of the case, learned Jt. CDR submitted that the entire case is based on documentary evidence and most of the documents are in the handwriting of the Director of the Company and this has been confirmed by the handwriting expert. Only contention which was sought to be raised on behalf of the respondents was that the report of the handwriting expert was biased and therefore, could not be relied upon. And, further that the documents produced on record were fabricated by the department. In view of the handwriting expert's report, the allegation made regarding fabrication of the record, according to the learned Jt. CDR, is totally without any substance. The Commissioner (Appeals) having ignored this aspect while setting aside the order of the adjudicating authority, according to the learned Jt.CDR, impugned order cannot be sustained and is liable to be set aside.

6. With the help of Jt.CDR, we have carefully perused the records placed before us. Perusal of the records discloses that the Commissioner (Appeals) has interfered with the order passed by the adjudicating authority essentially on the ground that apart from the documents which were seized from the premises of the respondents, no further investigation in relation to clandestine removal of the goods was carried out by the department so as to

corroborate the documentary evidence stated to have been seized from the premises of the respondent and which discloses the alleged production and removal of the goods. The Commissioner (Appeals) on the same ground has also arrived at the finding that there was no justification for imposing penalty. The specific finding in this regard arrived at by the Commissioner (Appeals) is to the effect that records do not disclose that the department has carried out investigation to find out the excess production details as also as to whether excess raw materials had been purchased, as to despatch particulars from the regular transporters of the product of the respondent, about the realisation of the sale proceeds, about the finished products, receipt details from regular dealers/ buyers, and about the excess power consumption. It has also been observed that investigation about such details could have been corroborative piece of evidence in relation to documents seized from the premises of the respondents.

7. It cannot be disputed that allegation of clandestine removal of manufactured goods by the manufacturer is an allegation of serious nature and therefore, Department is expected to establish the same by convincing and tangible evidence. The law in that regard is well settled. What could be a convincing and tangible evidence in a given case would depend upon the facts of each case. It cannot be forgotten that in a case where the evidence comprises of documents in the handwriting of the assessee himself which is proved to be so by the handwriting expert's opinion and further the same is not challenged by any counter evidence in that regard, it can hardly be contended in each and every such case that the department would still be

required to produce further evidence to corroborate such piece of evidence. It is not the quantity of evidence but the quality thereof which is very relevant. The Commissioner (Appeals) does not appear to have applied his mind to this aspect of the matter. Merely because no further investigation was carried out by the Department, that would not be justifiable ground, in the facts and circumstances of the case in hand, to discard the documentary evidence which clearly establish the same to be in the handwriting of the assessee and proves the fact of clandestine manufacture and clandestine removal of the goods thereby resulting in evasion of payment of duty.

8. It is also to be noted that the finding about total absence of investigation subsequent to the seizure of the documentary evidence from the premises of the respondents does not appear to be borne out from the records. In fact, some of the statements of the dealers in relation to the product of the respondent were recorded in the course of the investigation and this was to the knowledge of the respondents and in fact such statements corroborate the allegations against the respondents and this has been confirmed by the respondent themselves in the course of submissions before the adjudicating authority and it is clearly revealed from the order passed by the adjudicating authority. Being so, the finding by the Commissioner (Appeals) about the total absence of investigation to corroborate the evidence produced by the department is totally contrary to the material on the record, and therefore cannot be sustained.

9. Once it is clear that the evidence placed before the adjudicating authority clearly establishes the factum of clandestine manufacture and

removal of goods and no cogent evidence being produced by the assessee to counter the documentary evidence produced by the department and as documentary evidence produced by the department discloses the quantification of the product clandestinely manufactured and removed from the premises of the respondents, and the same establishes positive acts on the part of the assessee with intention to evade the duty and further establishes actual evasion of payment of excise duty in respect of products, in our considered opinion, there was no justification for the Commissioner (Appeals) to interfere with the order passed by the adjudicating authority.

10. Perusal of the order passed by the adjudicating authority clearly discloses that it refers to all the documents which were seized and placed before the authority and further detailed analysis of such documents. The impugned order nowhere discloses any analysis of such materials which could reveal the finding arrived at by the adjudicating authority either to be perverse or arbitrary, or to be contrary to the materials on record. Under the circumstances, therefore, the appellants are justified in contending that the impugned order discloses non application of mind to the materials on record while interfering with the order passed by the adjudicating authority.

11. The learned Jt.CDR has fairly submitted that there was no justification for the original authority to impose penalty in exercise of powers under section 11AC as the said section was not in force during the relevant period. Indeed considering the period during which the product is said to have been clandestinely manufactured and removed, the provision of law comprised under section 11AC were not in force and therefore, the

adjudicating authority could not have imposed penalty under the said provision of law. Consequently, the penalty imposed under the said provision of law was rightly set aside by the Commissioner (Appeals).

12. For the reasons stated above, therefore the appeals partly succeed. The impugned order is hereby quashed and set aside and the order of the original authority is restored except in relation to the imposition of penalty under section 11AC of the said Act. The appeals are disposed of in the above terms.

(Justice R.M.S. Khandeparkar)
President

(M. Veeraiyan),
Member(Technical)

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