TELEGRAM : CEGCANAL
Website : www.cestat.gov.in

REGISTERED / AD
Email : delhi@cestat.gov.in

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

Appeal No. E/3261/2006,4000/2006 - EX[DB]
E/1373,1374/2007 WITH E/M/310/2007 Date 02/12/2009

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

To :
SH JAGDISH AGARWAL,DIRECTOR
M/S SATGURU CEMENT P LTD,ZEERABAD,DIST-DHAR,MP,
SH JAGDISH AGARWAL,DIRECTOR Appellant
Vs
C.C.E. INDORE MISC ORDER NO.738/2009-EX Respondent

I am directed to transmit herewith a certified copy of **Final order No.** 1258-1261/ 2009 EX[DB] dated 27-11-09 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. INDORE
MANIK BAGH PALACE, POST BOX NO. 10, INDORE 452001 (M.P.)
2. Adv. / Consult
MR.L.P. ASTHANA & MS REENA KHAIR
R-163, SECOND FLOOR, GREATER KAILASH-1, NEW DELHI - 110 048.
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

Assistant Registrar
(Excise Appeal Branch)

18 M/S SATGURU CEMENT (P) LTD
ZEERABAD, DISTT- DHAR, MP

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
West Block No.2, R. K. Puram, New Delhi
COURT-III

Date of hearing/decision: 18.11.2009

Excise Appeal No. 3261 & 4000 of 2006

[Arising out of common order-in-Original No. 22/COMMR/CEX/IND/06 dated 30.6.2006 passed by the Commissioner, Customs & Central Excise, Indore]

For approval and signature:

Hon'ble Shri M. Veeraiyan, Technical Member
Hon'ble Shri D.N. Panda, Judicial Member

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

Shri Jagdish Agrawal, Director — Appellant
M/s Satguru Cement (P) Ltd.

Vs.

CCE, Indore — Respondent

Excise Appeal No. 1373 & 1374 of 2007 with Misc./310/2007

[Arising out of common order-in-Original No. 22/COMMR/CEX/IND/06 dated 30.6.2006 passed by the Commissioner, Customs & Central Excise, Indore]

CCE, Indore — Appellant

Vs.

M/s Satguru Cement (P) Ltd. — Respondent
Shri Jagdish Agrawal, Director

Appearance:

Appeared for the Appellant - Shri L.P. Asthana & Shri A. Jaju, Advocates
Appeared for the Respondent- Shri Sansar Chand, SDR

Coram: Hon'ble Shri M. Veeraiyan, Technical Member
Hon'ble Shri D.N. Panda, Judicial Member

FINAL Order No. 1258-1261 / 09-EX
MISC ORDER NO 738 / 09-EX
Per: M. Veeraiyan:

Appeals Nos. E/3261 & 4000 of 2006 are by the Appellant-Company, M/s Satguru Cement (P) Ltd. and Shri Jagdish Agrawal, its Director against the order of the Commissioner dated 30.6.06. The other Appeals Nos. E/1373 & 1374/07 are by the Department against the same impugned order.

2. Heard both sides extensively and perused the records.

3.1. The relevant facts, in brief, are that on 27.10.04, the Appellant company's factory was visited and private records in the form of ledger and notebook were recovered. The entries in the ledger, prima facie, indicated excess production of excisable goods and of clandestine removal during the period from 1.4.04 to 26.10.04 and ; statements of the Director and other concerned persons namely the General Manager and an employee of the Appellant-company were recorded who admitted the clandestine removal. It is submitted that the statement of the Director stands retracted on 28th August 2004 itself. However, it is conceded that other two persons have not retracted the statement. A sum of Rs.3.00 lakhs was paid on 29.10.04 and a further a sum of Rs.2.00 lakhs paid on 5.11.04 towards the duty liability. Show-cause notice was issued alleging unaccounted production and clandestine removal based on the private records mentioned above, the statements of employees and Director of the Appellant-company, and the statements of transporters and some dealers. The demand relating to the period prior to 1.4.04 was proposed alleging suppression of production by assuming production of one metric ton of cement for every 72.36 units of electricity consumed.

3.2. The Commissioner confirmed the demand relating to the period from 1.4.04 to 26.10.04 amounting to Rs.16,57,293/- and imposed penalty of Rs.15,64,359/- under Section 11AC and a penalty of Rs.1.00 lakh on Shri Jagdish Agrawal, Director of the Appellant company. However, he dropped the proceedings for demand of duty relating to the period prior to 1.4.04 except to the tune of Rs.3,79,648/-.

4. The ld. Advocate for the Appellant-company and the Appellant Director submits that the private records relied upon were unattested, unsigned legers where entries were made in pencil. He submits that Director promptly retracted the statement given by him admitting clandestine removal. The admission statement of the Director even if it is taken into consideration cannot be applied for the period prior to 1.4.04. The basis for show-cause notice demanding the period prior to 1.4.04 is arbitrary as allegation of suppression of production was made by assuming production of one metric ton of cement for every 72.36 units of electricity consumed. Their project report at the time of commencement of the factory envisaged consumption of 125 units of electricity per MT. As the machinery in the factory became old the electricity consumption per MT further increased. They also relied upon other evidences to show that the electricity consumption adopted in the show-cause notice for proposing demand was not sustainable. They were using generating set and electricity utilised, using such generating set have not been taken into account and if that is taken into account the per metric tone consumption

will be on the higher side. Therefore, he prays that order of the Commissioner which confirms demand based on non-reliable records and retracted statements be set aside. He also submits that orders of the Commissioner is not confirming the demand proposed merely based on the electricity consumption for the period prior to 1.4.04 is legal and proper and should not be interfered with.

5. The ld. SDR on behalf of the Department submitted that the private records for the period 1.4.04 to 26.10.04 clearly indicated suppression of production and clandestine removal. These facts have been admitted in the statements given by the Director himself, the General Manager and one of the employees. Further, he submits that as per the show-cause notice, the cost of electricity consumed for the year 2001-02, 2002-03 and 2003-04 amounted to Rs.92.00 lakhs, 89 lakhs and 80 lakhs respectively. When such huge expenditure has been incurred on electricity bills , the claim of the Appellant-company, that the value of clearances in each of the above years were below Rs one crore and they were within the small scale exemption is clearly not acceptable. Commissioner has discarded. this crucial evidence. Commissioner having confirmed demand of duty on excess production and clandestine removal for the period from 1.4.04 to 26.10.04, he could not have brushed aside the actual electricity consumption during the said period which worked out to be 72.36 units PMT of cement. He also submits that for the period prior to 1.4.04 also there were evidence of clandestine removal as has been relied upon in the show cause notice in paragraph 29 where quantity found in the invoices recovered from the dealers were higher than the quantity mentioned in the statutory record. He also submits that evidence of the transporters also indicated clandestine removal. He submits that the entire demand as per show

cause notice should have been confirmed and equal amount of penalty should have been imposed on the Appellant-company and the penalty on the Director should have been higher.

6. We have carefully considered the submissions from both sides. The Commissioner has confirmed demand of duty on the charge of suppression of production and clandestine removal based on private records for the period from 1.4.04. If the above charges are upheld, and if the production /clearance figures are accepted, then the department's contention is that for production of a metric ton of cement, the required electricity comes to 72.36 units which cannot be ignored. However, ld. Advocate also submitted that they were using generating set and electricity utilised, using such generating set has not been taken into account and if that is taken into account the per metric tone consumption would be on the higher side. It was submitted that adopting the electricity consumption as the basis for demand of duty for the period was not justified and that at any rate, on this ground, the demand is inflated as the consumption of electricity per MT adopted was on the lower side. We find that the show-cause notice relied primarily on the electricity consumption for working out the estimated production, the extent of suppressed production, quantum of clandestine removal and other evidences like the evidence from the dealer and the transporters have been relied upon as corroborative evidence. The basic issue is whether the electricity consumption per unit adopted in the show-cause notice is to be accepted or a higher consumption per metric ton as claimed by the Appellant is to be accepted. There appears to be contradiction in the approaches by the Commissioner for the period prior to 1-4-2004 and for period from 1-4-2004. This aspect requires scrutiny afresh, especially in the light of finding that the electricity bills was about Rs.92 lakhs in the

year 2001-02 and similar amounts for subsequent years even though they have claimed that the sales turn over of cement is less than a crore during each of the above years. We find that Commissioner has not properly examined these aspects and, therefore, we deem it appropriate to set aside the entire order and remand the matter for fresh consideration by the Commissioner. On the nature of the dispute, we clarify that we have not expressed any views on the merits of the case. We also clarify that all issues are kept open. The Appellants are permitted to file written submissions including documentary evidence they want to rely upon within 45 days from today and thereafter the Commissioner shall decide the matter afresh expeditiously after granting reasonable opportunity of hearing to the Appellant.

7. The Appeals by the parties and by the Department are allowed by way of remand in the above terms. In view of the above, Misc. Applications are also disposed of.

(Dictated & pronounced in open Court)

(M. VEERAIYAN)
TECHNICAL MEMBER

(D.N. PANDA)
JUDICIAL MEMBER

RM