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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/4676/2004 - EX[DB] Date 21/12/2009

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

To :
M/S SOLOMON INDUSTRIES LTD.
B-65/2, WAZIRPUR INDUSTRIAL AREA, NEW DELHI
110052

M/S SOLOMON INDUSTRIES LTD. Appellant
Vs
C.C.E. DELHI-I Respondent

I am directed to transmit herewith a certified copy of **Final order No. 1400/ 2009 EX[DB]** dated 18-12-09 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. DELHI-I
CENTRAL REVENUE BUILDING, I.P. ESTATE, NEW DELHI
110002
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MR.S.C. KAMRA & CO.
B-2/210(BASEMENT), SAFDARJUNG ENCLAVE, NEW DELHI- 110029
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
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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)
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18. HON'BLE PRESIDENT.

Assistant Registrar
(Excise Appeal Branch)

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.
Principal Bench, New Delhi

COURT NO. I

Excise Appeal No. 4676 of 2004

[Arising out of the Order-in-Appeal No. 108-110-CE/DLH/2004 dated 22/06/2004 passed by The Commissioner of Central Excise (Appeals), Delhi – I, New Delhi.]

For Approval and signature :

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

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 would 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 Department Authorities?	:

M/s Solomon Industries Ltd. — Appellant

Versus

CCE, Delhi – I — Respondent

Appearance

Shri S.C. Kamra, Advocate – for the appellant.

Shri K.P. Singh, Authorized Representative (SDR) – for the Respondent.

CORAM : **Hon'ble Justice R.M.S. Khandeparkar, President**
Hon'ble Shri Rakesh Kumar, Member (Technical)

DATE OF HEARING : 06/10/2009.
DATE OF DECISION : 18/12/2009

FINAL Oral Order No. 1408/09-EX Dated :

Per. Rakesh Kumar :-

The facts leading to filing of this appeal are in brief as under.

1.1 The appellants are engaged in the manufacture of socks knitting machines and their parts, chargeable to Central Excise Duty under sub-heading 8447.00 and 8448.90 respectively. Apart from manufacturing of socks knitting machines, the appellant are also engaged in trading of these machines and upgradation of customer's machines. The socks knitting machines are manufactured by assembling various parts, components and sub-assemblies. The duty paid parts are purchased by the appellant. Some parts are manufactured in-house. The manufacturing process of socks knitting machines can be divided into four broad sections. In the sub-assembly section, various parts of the machines are assembled to make sub-assemblies of various models like, 2nd Feed Cam Assembly, R.H. Stitch Cam Assembly, L.H. Stitch Cam Assembly, Shell Assembly and Sinker Cam Assembly etc. In the assembly section, various sub-assemblies are assembled together to make machine structure. The main parts used in assembly stage are Main Frame, Pillar, Base Plate, Bearing Housing, Spindle, Guide Plate, Column, Upper Track Plate, Locating Pin, Cutter Brackets, Piston Body, Air Cylinders, Shell, Bottom Plates, Brackets, V.T. Holder etc. While the machines are made according to the specific orders and requirements of the individual customers and are tailor-made machines, the assembly process upto assembly section is common. In the knitting section, various parts and components and special parts keeping in mind the customer's requirement are mounted and the machine in finished form comes into existence. The important parts mounted in the knitting section include Needles, Rilson Tube, Cards, Electric Motor, Tee Dia, Tool Tray, Control Box etc. After completion of the machine in the knitting section it is sent to the testing section, where after extensive testing, it is delivered to the customer.

1.2. On 01/10/99, the Central Excise Officer from the Directorate General of Central Excise Intelligence, New Delhi, visited the appellant's factory and conducted search. In course of search, they resumed some records from the factory premises. One such document resumed is "monthly progress reports of machine building" for the period from May 1997 to August 1998, which contained monthwise details of production of various models of machines. Statement of Shri Sumeet Kapoor, DGM (Production) was recorded on 4/8/2000, wherein he stated that he is incharge of production in the appellant's factory, that he was submitting progress reports of production to the Management, that the entries in the "progress reports of machine building" (page 34,37,38,40,41,49,50,51 & 55 of the file marked A/52) contain the monthwise details of the production of structures of various models of the machine, not of fully finished machines and that after manufacture of structure, the machine becomes complete within a week's time. The Investigating Officers compared the monthwise production of various models of machines, as given in the machine building progress reports, with the RG-1 register and found that during certain months the production, as recorded in the RG-1 register, was much less as compared to the production of those models, as mentioned in the progress reports, and in some months, while the progress reports mentioned production of certain number of machines of some particular models, in the RG-1 register, there were no entries regarding the manufacture of machines of those models. Since Shri Somnath, the Managing Director of the appellant company, could not give any explanation for this discrepancy, Investigating Officers took the view that the machines, whose production is recorded in the progress reports and in respect of which there is no entry in the RG-1 register, had actually been manufactured but not recorded in the RG-1 register and had been cleared clandestinely without payment of duty. It is on this basis that a show cause notice dated 21/5/01 was issued to the appellant company seeking recovery, alongwith the interest, of allegedly short paid Central Excise Duty amounting to Rs. 14,82,000/- (Rupees Fourteen Lakh Eighty Two Thousand) chargeable in respect of clandestine clearances without payment of duty of various models of machines, as detailed in Annexure A to the show cause notice and also for imposition of penalty on the appellant company under Section 11AC of Central Excise Act, 1944 and on Shri Somnath, Managing Director of the appellant's company and Shri Sumeet Kapoor, DGM under Rule 209A of the Central Excise Rules, 1944. The show cause notice was adjudicated by the Additional Commissioner vide order-in-original No. 38/2003 dated 18/9/03 by which the duty demand was confirmed under Section 11A (1) of Central Excise Act, 1944 alongwith interest at the applicable rate under Section 11AB of the Central Excise Act, 1944 and beside this, penalty of Rs. 14,82,000/- was imposed on the appellant company under Section 11AC of the Central Excise Act, 1944 and penalty of Rs. 1,50,000/- (Rupees One Lakh Fifty Thousand) each was imposed on Shri Somnath, Managing Director and Shri Sumeet Kapoor, DGM (Production) of the appellant's company under Rule 209A of the Central Excise Rules, 1944.

1.3. On appeal to Commissioner Central Excise (Appeals), against this order, the CCE (Appeals) vide order-in-appeal No. 108-110/CE/DLH/2004 dated 22/06/04 reduced the duty demand to Rs. 10,66,000/- (Rupees Ten Lakh Sixty Six Thousand) and also penalty on the appellant company under Section 11AC to Rs. 10,66,000/- and set aside the penalty on Shri Somnath, Managing Director and Shri Sumeet Kapoor, DGM (Production) of the appellant's company. It is against this order that the present appeal has been filed by the appellant challenging the upholding of the duty demand of Rs. 10,66,000/- alongwith interest and penalty of equal amount under Section 11AC.

2. Heard both the sides.

2.1 Shri S.C. Kamra, Advocate, the learned Counsel for the appellant made the following submissions.

(1) The comparison of entries in the machine building progress reports, with the production of fully finished machines recorded in RG-1 register is erroneous. The machine building progress reports had been prepared by Shri Sumeet Kapoor who was incharge of production of machines only upto assembly section, where the sub-assemblies were being assembled into the machine structures. Comparing the production of machine structures of a particular model of machine, as mentioned in the progress reports, with the production of fully finished machines of that model, as recorded in RG-1 register, is wrong, as the figures given in the progress report show only the number of machines structures assembled in the assembly section and at this stage, the machines are only in the shape of intermediate products/structures, which by no stretch of imagination, could be treated as fully manufactured socks knitting machines. Since the fully finished machines as per the customer's requirement, are assembled as and when the orders are received and assembling fully finished machine from the basic components takes time, the appellants were keeping the machine structures of the machines of various models in stock and as and when they received the orders from the customers, the machine structures were sent to the knitting

section for assembly of the fully finished machines, which normally used to take one week's time.

(2) The production of machine structures of different models of machines, as mentioned in the progress reports, cannot be treated as production of fully finished machines of that model during that month, as the assembly of fully finished machines is undertaken only when the orders are received from the customers. In fact, in some months during the period of dispute, the production of fully finished machines of some models, as recorded in RG-1 register, is more than the production of machines structures of those models, shown in the progress reports.

(3) The Department has relied upon the details given in Annexure A to the show cause notice to demonstrate that during the month of November 1997, the number of machines of model No. MIMC3 were shown correctly in the RG-1 register as the same number of machines structures were also appearing in the progress report of the same month. It is mere co-incidence that the number of machines in the RG-1 register and in the progress report was same, but this does not lead to an inference that the entries of the machine structures appearing in the progress reports were of fully manufactured knitting machines.

(4) The Commissioner (Appeals) has failed to appreciate that in the month of October 1997, the number of

machines/structures of a particular model M3EC4-FE were two, while in the RG-1 register four pieces of the same model were entered and similarly in the month of May 1998, ten pieces of the above model/machines were shown in the progress report, while in the RG-1 register as many as 20 (twenty) pieces were entered. In case, without admitting, it is assumed that the entries made in the progress report represent the production of fully manufactured knitting machines, the appellants would not have entered production of higher number of machines in the RG-1 register in the respective months. This demolishes the view taken by the Adjudicating Authority as well as by the Appellate Authority to the effect that the appellant did not record the entire production as per the progress report, in the RG-1 register and the machines not accounted for in the RG-1 register had been removed clandestinely without payment of duty.

(5) The Commissioner (Appeals) has erred in concluding that on the basis of the deposition of Shri Sumeet Kapoor in his statement dated 4/8/2000, the progress reports prepared by him showed production of fully manufactured knitting machines and not the structures of the said machines. Merely because the word 'structure' is not appearing in the progress reports, it cannot be assumed that entries pertained to fully manufactured machines and not to the structures, specially when Shri Kapoor in his

statement has categorically clarified that the details of the machines shown in the progress report were the structures of the machines manufactured during the respective months. Shri Kapoor in his statement has also clarified that one week's time is taken to complete the machine from the date the structure is handed over to knitting section, which is done only when a confirmed order is available. Therefore, it is wrong to conclude that a fully finished machines comes into existence within a period of one week's from the date on which machine structure is made.

(6) Shri Somnath, Managing Director of the appellant company, in his statement has specifically denied the clandestine removal of machines without payment of duty. All he has clarified is that he is ready to pay duty involved on the machines which are mentioned in the production report and tested and tried, but not accounted for in the central excise records. The words tested and tried means the machines are fully manufactured in the knitting section and thereafter tested. Shri Somnath, therefore, nowhere has admitted lapse on his part and his statement cannot be treated as admitting the evasion of duty.

(7) Tribunal in a series of judgments has held that duty demands based merely on private notebook, diary or report prepared by employee are not sustainable unless the entries are sufficiently corroborated or supported by other evidence, such as raw material consumed, electricity

consumed, seizure of goods on spot etc. Therefore, in this case the duty demand based on only one document – progress reports prepared by Shri Sumeet Kapoor, DGM (Production) and that too far a limited period, is not sustainable.

(8) As held by the Tribunal in the series of judgments – **Icycold Commercial Enterprises vs. CCE – 1994 (69) E.L.T. 337 (Tribunal); M. Square Chemicals vs. CCE – 2002 (146) E.L.T. 323 (Tribunal)** and **Emmtex Synthetics Ltd. vs. CCE, New Delhi – 2003 (151) E.L.T. 170 (Trib. – Del.)**, the burden of proving of clandestine removal is on the department and it is the department which is required to discharge this burden by producing cogent and tangible evidence in support of manufacture of goods and their removal clandestinely by the assessee. In this case no such evidence has been produced.

(9) Since, the duty demand is not sustainable, there is no question of imposition of any penalty on the appellant's company under Section 11AC and penalty on Shri Sumeet Kapoor, DGM (Production) and Shri Somnath, Managing Director of appellant's company under section 209A of Central Excise Rules, 1944.

2.2 Shri K.P. Singh, the learned Departmental Representative, defending the impugned order, made the following submissions.

(1) Even if the details of the production of various models of machines, as shown in the progress report, pertained to the production of semi-finished machine in the assembly section, their stock was required to be mentioned in the RG-1 register in the column meant for the stock in finishing room. But this has not been shown in the RG-1 register

(2) wherever the production of certain models of the machines, as mentioned in the progress reports maintained by DGM (Production) is much more than the production of finished machines of those models as recorded in the RG-1 register, the appellant have to explain the reason for such difference for which no satisfactory explanation has been given either by the DGM (Production) or by the Managing Director. Therefore, the Department has rightly concluded that the difference between production of various models, as recorded in progress report and the production of those models as mentioned in the RG-1 register during the same month, represents the number of machines which have been manufactured but removed clandestinely without payment of duty.

(3) Shri Somnath, the Managing Director of the appellant's company in his statement expressed his willingness to pay duty on the production of machines which were not accounted for in the central excise record.

3. We have carefully considered the submissions from both the sides and have pursued the records. The appellant company manufacturers socks knitting machines and parts thereof. The undisputed facts are that –

(a) In the appellant's factory, the manufacture of fully finished socks knitting machine is a four step process involving –

(i) assembling the parts procured from outside as well as manufactured in house into sub-assemblies in the sub-assembly section ,

(ii) assembling the various sub-assemblies and other parts in the assembly section into machine structures,

(iii) mounting other parts so as to complete the machine in the knitting section and

(iv) testing and trial of the machine prior to delivery to the customer ;

(b) The socks knitting machines are manufactured as per the requirement of the customers and within a particular model there are variations from machine to machine depending upon the individual customer's requirement ;

(c) While the assembly of machine upto machine structure stage in assembly section is more or less common, at the final assembly stage in the knitting section, various other components including the components as per the requirement of the individual customers, are added and

(d) manufacturing process from machine structure stage to manufacture of fully finished and tested machine takes about a week's time.

3.1 The appellant had been maintaining the record of fully finished machine in the RG-1 register. The department's case against the appellant is that during search of the factory on 01/10/99, a file mentioned against Sl. No. A52 of Annexure to the Panchnama of the search of the factory, was recovered from the factory, which contained reports called "progress reports of machine building" for the period from May 1997 to August 1998 and these progress reports contained monthwise and modelwise details of production of various models of the socks knitting machines and during certain months, the production of different models of machines, as mentioned in the progress reports, is more than the production of those models of machines as mentioned in RG-1 register and since the appellant have not been able to give any explanation for this difference, the machines whose production is mentioned in the progress reports, but is not reflected in the RG-1 register, had been cleared clandestinely without payment of duty. According to the department, during May 1997 to March 1998 period, as against the production of 28 machines of various models recorded in progress reports during the several months, in the RG-1 register only 6 machines has been accounted for and 22 machines are alleged to have been cleared without payment of duty and in the same manner, during April 1998 – August 1998 period, as against the production of 41 machines of different models mentioned during different months in the progress reports, the production of only 20 machines of those models during those months has been accounted for in the RG-1 register and on this basis 21 machines are alleged to have been cleared without payment of duty. However, in the course of investigation, when the statement of Shri Sumeet Kapoor, the DGM (Production) of the appellant's company recorded, he has stated that the production of machines of different models, as mentioned in the progress reports, is not the production of fully finished machines but is the production of machine structures of various models and he also stated that the process from machine structure stage to assembly of the fully finished and tested machine takes about one week's time. Shri Kapoor, however, in his statement has accepted that the progress reports while mentioning the production of various models of machines, do not used the word "machine structure".

3.2 The plea of the appellant on the other hand is that since each machine was being manufactured as per the customer's requirements, and since the manufacture upto machine structure stage in assembly section was common, they were keeping in stock only the machine structures of different model of machines, which were being sent to the final assembly section – knitting section, as and when the orders were received from the customers and that this is clear from the fact that during the certain months, the production of certain models of fully finished machines, as recorded in RG-1 register is much higher than the production of those models as mentioned in the progress reports, which shows that the production of extra machines reflected in RG-1 register had come from the stock of the machine structures in the assembly section.

3.3 Thus the point of dispute in this case is as to whether the production of different models of machines, during May 1997 – August 1998 period, as mentioned in the 'progress reports', can be treated as production of fully finished machines, as alleged by the Department.

4. We find that for October 1997, the production of machines of Model M3EC4-FE, as recorded in progress report is two, while in the RG-1 register, production of four machines of the same model has been recorded and similarly, for the month of May 1998, while the production of ten machines of the above model is recorded in the progress report, in the RG-1 register, production of 20 fully finished machines of that model has been recorded. This shows that the production of various models of machinery, as recorded in "monthly progress report of machine building", which is available for May 97 – August 98 period, does not tally with the production recorded in RG-1 register for this period and while for some months, the production of certain models, as recorded in Progress report, is more than the production of those

models as recorded in RG-1, on the basis of which duty demand has been raised, for some months, the production of certain models, as recorded in RG-1 register is more than the production recorded in the progress reports. The lower authority have proceeded on the assumption that even if the production of machines of different models, as mentioned in progress reports, is treated as the production of semi-finished machines/machine structures, the same would become fully finished machines within a week's time as per the statement of Shri Sumeet Kapoor, DGM (Production) and therefore the production recorded in 'Progress reports' can be treated as production of fully finished machines. This assumption may not be always correct as according to the appellants the machine structures of particular model are normally sent to final assembly section only when the orders for those models are received from the customers and as per the Statement of Shri Kapoor, a fully finished machine emerges only after about a week from the date of receipt of semi finished machine in the final assembly section. We are, therefore, of the view that reconciliation of the production of machines of different model from May 1997 – August 1998 period, as recorded in the – "monthly progress reports of machine building:, must be done with the production recorded in the RG-1 register, keeping the above point in mind and duty demand can be confirmed accordingly in accordance with the provision of law.

5. In view of our above discussion, the impugned order is set aside and the matter is remanded to the Original Adjudicating Authority for denovo adjudication as per our directions in para '4' above.

(Pronounced in open court on 18/12/09)

(Justice R.M.S. Khandeparkar)
President

(Rakesh Kumar)
Member (Technical)

PK