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

Appeal No. E/1755/2006-SM[BR] Date 23/05/2008

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

To :
CCE,GHAZIABAD

CGO COMPLEX II KAMLA NEHRU
NAGAR,GHAZIABAD
CCE,GHAZIABAD Appellant

Vs

M/S DIAMOND AUTO IND Respondent

I am directed to transmit herewith a certified copy of **Final order No.** 816 /2008 –SM[BR] dated 14.5.2008

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

Assistant Registrar

(SM Appeal Branch)

Copy to :
1. Respondent

M/S DIAMOND AUTO INDUSTRIES

GHOOKNA MORE,DELHI MEERUT ROAD,GHAZIABAD
2. Adv. / Consult

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 Delhi -
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 60017
13. Taxindiaonline.com Pvt.Ltd, B-XI/8183,Vasant Kunj, New Delhi - 110070
14. Office Copy
15. Guard file

Assistant Registrar
(SM Appeal Branch)

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

Excise Appeal No. 1755 of 2006-SM

(Arising out of Order-in-Appeal No. 22-CE/GZB/2006 dated 9.3.2006 passed by the Commissioner (Appeals), Central Excise, Ghaziabad)

For approval and signature

HON'BLE JUSTICE S.N. JHA, PRESIDENT

1.	Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	
2.	Whether it would be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	
3.	Whether their Lordships wish to see the fair copy of the order?	
4.	Whether order is to be circulated to the Departmental authorities.	

CCE, Ghaziabad — Appellant

Vs.

M/s Diamond Auto Industries — Respondent

Appearance:
Shri S.L. Meena, DR - For appellant
Req. on merits - For respondent

CORAM:
HON'BLE JUSTICE S.N. JHA, PRESIDENT

Date of Hearing: 14.5.2008

Final Order No. 816/08-SM(BR)...............dated 14.5.08

Per Justice S.N. Jha :

This appeal was taken up for hearing ex.parte in view of the request letter of the respondent to decide the appeal on merit.

2. This appeal by the Revenue is directed against the order-in-appeal of the Commissioner (Appeals),

Ghaziabad dated 9.3.06 dismissing the Department's appeal which was directed against the order-in-original of the Assistant Commissioner dated 3.11.2004, by which Assistant Commissioner had imposed penalty of Rs. 5000/- under Rule 25 of Central Excise Rules, 2002 and further penalty equal to the amount to duty under Section 11AC of the Central Excise Act. The Commissioner held that as the assessee had deposited the duty on the date of detection of shortages, penalty was not imposable. In taking this view the Commissioner followed the decision of the Tribunal in the cases of **Sri Selvakumar Textiles Vs. CCE** – 2005 (188) ELT 334 (T) and **Rastriya Ispat Nigam Vs. CCE** - 2003 (161) ELT 285. The latter decision was challenged by the Department in the Supreme Court without success vide - 2004 (163) ELT A53. It is well settled law that summary dismissal of SLP or civil appeal does not tantamount to affirmance of the judgment of the High Court, or the Tribunal, on merit; it merely means that the Supreme Court declined to interfere in the matter.

3. Attention was drawn to the decision of the High Court of Punjab & Haryana in the case of **CCE Vs. Machino Montell (I) Ltd.** – 2006 (202) ELT 398 wherein it has been

held that once a case is covered by any of the situations mentioned in Section 11AC of the Act, mere deposit of duty prior issue of show-cause notice does not necessarily negate situation. I am in respectful agreement with the view expressed by Hon'ble Punjab & Haryana High Court. Sub-section (2B) of Section 11A which stipulates that where any duty of excise has not been levied or paid or has been short levied or short paid or erroneously refunded, the person chargeable with duty may pay the amount of duty before service of the notice on him under sub-section (1) of Section 11A. Sub-section (2B) of Section 11 is not applicable where the non-levy/payment or short-levy/payment etc. was by reason of fraud or collusion or any wilful mis-statement or suppression of facts or contravention of any of the provisions of Act or of the Rules with intent to evade payment of duty under Section 11AC of the Act. However, in the instant case, there is nothing to suggest that shortage of stock was by reason of fraud, collusion etc. Learned DR submitted there was contravention of the provisions of the Central Excise Act/Rules attracting Section 11AC. But it is clear that mere contravention is not enough unless there is also intention to evade payment of duty. Shortage of stock may arise in various situations not necessarily reflecting intention to evade payment of duty. In the instant case the Assistant Commissioner had imposed penalty under Rule 25 of the Central Excise Rules and the appeal filed by the Revenue seeking imposition of penalty under Section 11AC of the Act was totally mis-conceived. In my view, although the deposit of duty before issuance of show-cause notice by itself does not absolve any person of the liability to penalty, no interference with the order in the facts of the case is warranted.

4. Accordingly, I would decline to modify/cancel the order of the Commissioner, although for a different reason, and dismiss the appeal.

(Dictated & pronounced in open Court)

(JUSTICE S.N. JHA)
PRESIDENT

RM