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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/1580/2006-1581/2006-SM[BR] Date 25/06/2008

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

To :
CCE,JAIPUR-I

NCRB STATUE CIRCLE C SCHEME JAIPUR

CCE,JAIPUR-I Appellant

Vs

M/S SUMETCO ALLOYS P LTD. Respondent

I am directed to transmit herewith a certified copy of **Final order No**. 985 -986 /2008 –SM[BR] dated 8.4.2008

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 SUMETCO ALLOYS P LTD.
   2. SHRI NIRMAL BHANDARI, DIRECTOR
   G-740,PHASE-II,RIICO INDL AREA,BHIWADI,DISTT ALWAR,(RAJ)
2. Adv. / Consult SHRI BIPIN GARG ADV.
   B-1/1289-A, VASANT KUNJ NEW 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 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 AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI
PRINCIPAL BENCH NEW DELHI

Excise Appeal No.1580-81 of 2006-SM (BR)

[Arising out of Order-in-Appeal No.43-44(MPM)CE/JPR-1.2006 dated 13.2.2006 passed by the Commissioner of Central Excise (Appeals), Jaipur]

Date of Hearing/ Decision:8.4.2008

For approval and signature:

Hon'ble Mr. P.K. Das, Member (Judicial)

1. Whether Press Reporters may be allowed to see CESTAT (Procedure) Rules, 1982.		
2. Whether it should be released under Rule 27 of the 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?	:	
4. Whether Order is to be circulated to the Departmental authorities?	:	

CCE, Jaipur-I ...Appellants
[Rep. by Shri S.L. Meena, DR]

Vs.

1. Sumetco Alloys Pvt. Ltd.
2. Shri Nirmal Bhandari, Director ...Respondents
[Rep. by Bipin Garg Advocate]

CORAM: **Mr. P.K. Das, Member (Judicial)**

Final Order No. 985-986/08-SM(BR) /Dated: 8.4.2008

Per P.K. Das:

The relevant facts of the case, in brief, are that the Respondent No.1 is engaged in the manufacture of Lead and Lead Based Alloy classifiable under Sub-heading No.7803.10 of the Central Excise Tariff Act, 1985, availing benefit of SSI exemption. On 7.1.2005, the Central Excise Officers intercepted a truck loaded with the said goods accompanied with Invoice No.63 dated 7.1.2005 of the Respondent Company. On verification of the loaded truck, it was found excess quantity of 11500 Kgs. over and above the quantity shown in the invoice. The Central Excise Officers visited the Respondents' factory and found one "Lotus Notebook". Shri Jawahar, Supervisor of the Respondents Company in his statement stated that the Notebook relates to clearance of the goods from the factory. On 11.1.2005, Respondent No.2, Director of the Respondent No.1 appeared before the Central Excise Officers and produced Invoice No.64 dated 7.1.2005 in respect of the excess quantity of 11,500 Kgs. and his statement was recorded. Again on 12.5.2005, the statement of the Respondent No.2 was recorded. Show cause notice was issued proposing to confiscate the seized goods found in the truck and demand of duty on the basis of the Notebook and imposition of penalties on both the Respondents. The Adjudicating Authority confiscated the seized goods and the truck and ordered to enforce the bond and to encash the bank guarantee in lieu of confiscation. He confirmed the demand of duty of Rs.9,17,553/- and imposed penalty of equal amount under Section 11 AC of the Central Excise Act, 1944 on the Respondent No.1 and a penalty of Rs.2,00,000/- under Rule 26 of the Central Excise Rules, 2002 on the Respondent No.2. The Respondents filed appeal before the Commissioner (Appeals), whereby Adjudication Order was set aside. Hence, the Revenue filed these appeals against the Respondents.

2. Ld. DR on behalf of the Revenue submits that the Commissioner (Appeals) erroneously held that some entries in the Notebook are vague, without any corroboration. He further submits that the Respondent No.2 disowned Notebook, but the Supervisor in his statement admitted that the Notebook relates to clearance of the goods. He also submits that the goods were seized on 7.1.2005 and the Respondent No.2, Director of the Company produced the Invoice No.64 dated 7.1.2005 on 11.1.2005, which indicates the manipulation of the documents. He relied upon the decision of the Tribunal in the case of CCE, Jaipur Vs. M/s. Jyoti Cement (P) Ltd. – Final Order No.976-979/2005-Ex dated 30.11.2005.

3. Ld. Advocate on behalf of the Respondent reiterates the findings of the Commissioner (Appeals). He submits that the Adjudicating Authority observed that the maintenance of Notebook by the Supervisor was reasonably expected but the Investigating Authority did not verify the contention of the Supervisor with the Respondent No.2. He further submits that the there is no iota of evidence of clandestine removal of goods and the Respondents had no knowledge of the Notebook. He drew the attention of the Bench to the Annexure to the show cause notice in support of his contention that the entries made in the Notebooks are

vague. He relied upon the decision of the Tribunal in the case of D.P. Industries Vs. Commissioner of Central Excise, Allahabad – 2007 (218) ELT 242 (T-Delhi). He submits that the Respondent No.2 in his statement before the Central Excise Officers categorically explained that the Invoice No.64 dated 7.1.2005 was lying in the drawer and the employees failed to produce the same to the Central Excise Officers at the time of their visit.

4. After hearing both the sides and on perusal of the records, I find that during the material period, the Respondents were clearing the goods without payment of duty under SSI exemption and the clearance value was within Rs.1 Crore. It has been alleged that after taking into account the entries in the Notebook and the clearance of the statutory records, the Respondent crossed the full exemption of Rs.1 Crors and they are liable to pay duty thereon. It is seen that the Respondents disputed authenticity and ownership of the Notebook. On perusal of the statement as recorded in the Adjudication Order, it appears that the Supervisor stated that the Notebook relates to clearance of the goods. But the Respondent No.2 in his statements dated 11.1.2005 and 12.5.2005 stated that the Notebook was not maintained by the authorized signatory of the Respondent Company and he had no knowledge of the said Notebook. Admittedly, the supervisor was not the authorized signatory of the appellant company. But the Investigating Officers neither verified the contention of the Supervisor with the Respondent No.2 nor there is any corroboration of

the statement of supervisor. In this connection, the findings of the Commissioner (Appeals) is reproduced below:-

"9. As regards, computation of figures of clandestine removal of 2,22,836.200 Kg. Lead ingots during 2003-2004 and 2004-205 on the basis of private record, leading to central excise duty demand worth Rs.917553/-. I observe that the department has computed the said demand duty on the basis of private record and statement of supervisor. I also observe that the Appellant has contended that, the said private record does not belong to them. Figures shown in the said private records are not based on facts, they pointed out entry no.10,12, 14 and 15 from the chart for the year 2003-2004 and entry no.12 and 14 from the chart for the year 2005-05, which proves that these entries are vague. The department has not produced any evidence regarding clandestinely acquisition of raw material, manufacture of goods, excess consumption of electricity, enquiry from buyers about such purchase, flow back of funds from the buyers, in absence of which, charges of clandestine removal are not sustainable. In support of their contention they referred, catena of decisions. In this regard, I find that, there is nothing on record to show that, the said private record bear signature or handwriting of any of the authorized person of the Appellant. Except the entry relating to Invoice No.63 & 64 and four other entries, no other entry was found corroborated with RG 1 register. The above entries pointed out by the Appellant, show that, the figures of quantity shown in that record are not matching with the numbers of ingots or average weight of the ingots. I also agree with the Appellants plea that, there is nothing on record to prove that the alleged goods were manufactured in the factory of the Appellant, the Appellant had received unaccounted raw material, consumed excess electricity and received funds from the buyer against the alleged sale. In absence of which charges of clandestine removal cannot be established."

5. It is revealed from the Adjudication Order that the Respondents contended that the Mould for casting of ingots /slabs out of the molten material in the Respondents' factory has the capacity of moulding ingots/slabs of standard weight of 23 Kg. with a variation of plus or minus one or two kgs. It has further been contended that if the quantity is ascertained multiplying by 23 kgs. per piece of ingot, the quantity comes more than reflected in the Notebook. Therefore, the entries made in the Notebook are vague and not reliable. In support of this, the ld. Advocate drew the attention of the Bench to some of the entries as recorded in Annexures to the show cause notice as under:-

(a) Annexure A (1), Sl.No.10 dated 23.2.2004 Note Book indicates 132 pieces = 12934.900 Kgs.

Ld. Advocate submits that 132 pieces x 23 Kgs., the quantity comes to 3096 Kgs. So, the quantity shown 12934.900 Kgs. in the Notebook is vague.

(b) Annexure A(1), Sl.No.12 dated 1.3.2004 Note Book indicates 10 pieces = 25867.00 Kgs.

Ld. Advocate submits that 10 pieces x 23 Kgs. the quantity comes to 230 Kgs. So, the quantity shown 25867.00 Kgs. in the Notebook is absurd.

(c) Annexure A(1), Sl.No.14 dated 9.3.2004 Note Book indicates 460 pieces = 20079.000 Kgs.

Ld. Advocate submits that 460 pieces 23 Kgs., the quantity comes to 10,580 Kgs.

(d) Annexure A (II), Sl.No.12 dated 9.6.2004 Note Book indicates 133 pieces = 10017.000 Kgs.

Ld. Advocate submits that 133 pieces of ingots comes to 3039 Kgs.

(e) Sl.No.14 dated 20.06.04 of the Annexure A(2) indicates 550 pieces = 15251.500 Kgs. in the Notebook. It is contended by the Respondent that 550 pieces of ingots comes to 12560 Kgs.

6. The above figures indicate that the entries in the Notebooks are totally misconceived and inconsistent. Thus, it appears that the entries in the Notebook are vague and not corroborative with the records. The Adjudicating Authority observed that the maintenance of such Notebooks by the Supervisor was reasonably expected. But the Investigating Officers did not examine the Respondent No.2, at this regard and there is no other corroborative evidence on record to show the clandestine removal of the finished goods on the basis of Note Book. In any event,

the demand of duty on the basis of a Note Book maintained by the employee, who is not authorized person and is not corroborative with any evidence, is unjust, improper and unreasonable. The Division Bench of the Tribunal in the case of D.P. Industries (supra) held that high probability of existence of clandestine clearance of strong suspicion cannot take place of evidence. The relevant portion of the said decision is reproduced below:-

> "No doubt, the appellants have been stone-walling the investigation by not revealing the facts but it is for the investigation to adopt proper methods to bring out the truth in such circumstances. No doubt, the seized records indicate to a high probability of the existence of clandestine clearance and raised the suspicion of the departmental officers. The suspicion, however, strong cannot take the place of evidence. There are several decisions of the Tribunal holding that clandestine clearance has to be established beyond reasonable doubt and not on the basis of preponderance of probability. Merely on the basis of private E records, clandestine clearance cannot be upheld. There should be sufficient corroborative evidences. The receipt of I excess raw materials, power consumption, receipt of unaccounted money etc. have to be established. In the present case, the investigating officers failed to bring out evidences required for confirmation of the demand on the alleged clearances. Therefore, we are constrained to give the benefit of doubt to the appellants and drop the proceedings against them. Thus, we allow the appeals."

7. Ld. DR relied upon the decision of the Tribunal in the case of Jyoti Cement Pvt. Ltd. (supra). In the present case the Respondent disputed the authenticity and ownership of the Notebook and, therefore the said case law is not applicable herein.

8. I also noted that the Adjudicating Authority observed that the seizure of the goods and the vehicle was not ordinary situation, being the Director of the Company, the Respondent No.2 should have immediately rushed to submit the invoice not accompanied with the consignment so that seizure could be avoided. It is seen from the statement of the Respondent No.2 as reproduced in the Adjudication Order, he had explained in detail why the Invoice No.64 dated 7.1.2005 was not presented before the officers during visit to the factory. In any event, the demand of duty on the basis of Notebook is not sustainable in absence of sufficient corroborative evidence. Therefore, Invoice No.64 dated 7.1.2005 cannot be rejected for 3 days delay to produce before the Central Excise Officers. In view of the above discussion, I do not find any reason to interfere the order of the Commissioner (Appeals). Accordingly, the appeals filed by the Revenue are rejected.

Order dictated & pronounced in open court on 8.4.2008.

(P.K. Das)
Member (Judicial)

Ckp.