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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/1979/2006 – SM [BR] Date 25/11/2008

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

To :
C.C.E. CHANDIGARH
C.R. BUILDING, PLOT NO. 19, SECTOR 17-C,
CHANDIGARH 160017

C.C.E. CHANDIGARH Appellant
Vs
M/S PRITAM SINGH HUNJAN & BROS Respondent

I am directed to transmit herewith a certified copy of **Final order No.** 1510 / 2008- SM[BR] dated 3.11.2008 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 PRITAM SINGH HUNJAN & BROS
   AMLOH RAOD,MANDI GOBINDGARH, PUNJAB
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 - 3
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
13 Taxindiaonline.com Pvt.Ltd. B-XI/8183.Vasant Kunj. New Delhi - 110070
14 Easy Service Tax Online Dot Com Pvt.Ltd.407A.Iscon Mall.Above Star India Bazar.Satellite Road.Ahmedabad-1
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Assistant Registrar
(SM Appeal Branch)

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No.2, R.K.Puram, New Del
P[hi-110066.
Principal Bench, New Delhi.

E/1979/06-SM

[Arising out of Order-in-Appeal No.148/CE/CHD/06 dt.28.2.06 passed by the Commissioner(Appeals), Chandigarh)

For approval and signature:

Hon'ble Mr. 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?	:
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 Department Authorities:	:

CCE, Chandigarh — Appellant

Versus

M/s. Pritam Singh Hunjan & Bros. — Respondent

Appearance

Shri Sansar Chand, Authorised Departmental Representative(DR) For appellant
Shri Bipin Garg, Adv. For respondent

Coram: Hon'ble Mr. RAKESH KUMAR, MEMBER (TECHNICAL)

Date of decision: 3.11.08
Final Order No. 1510/08-SM (BR)

Per Rakesh Kumar:

In this case the Appellant's factory premises were visited by the Central Excise Officers on 19.7.01. In the course of visit, the officers recovered 11 sale invoices from their office in the factory premises. On verification, it was noticed that the quantity and names of the consignees mentioned on the recovered invoices were different from these details as mentioned in the sale invoices of the same number on record. The total duty on the goods covered by these invoices was Rs.3,06,538/-. On enquiry with the partner of the Appellant, they could not give any explanation at that time and they promised to deposit the duty which was deposited on 20.7.01. However, subsequently the Revenue issued a show cause notice on 28.1.05 for demand of interest under Section 11AB and imposition of penalty under Section 11AC. The jurisdictional Asstt. Commissioner vide order-in-original dt.29.12.05 rejecting the Appellant's contention that there is no evidence of clandestine removal of the goods against the parallel invoices, confirmed the duty demand of Rs.3,06,538/- which had already been paid and besides this penalty of equal amount under Section 11AC was imposed and also interest on duty under Section 11AB was demanded. On appeal, the Commissioner(Appeals) vide the impugned order set aside the interest and penalty on the ground that since in this case, entire duty amount had been paid prior to the issue of show cause notice, in view of the Tribunal's judgment in the case of Rashtriya Ispat Nigam Ltd. vs CCE reported in 2003(161)ELT.285 which has been upheld by the Hon'ble Supreme Court of the judgment reported in 2004(163)ELT.A.53 and also in view of the Larger Bench judgment in the case of CCE vs Machino Montell(P) Ltd. reported in 2004(62)RLT.709, neither any penalty is imposable nor interest is chargeable. The Commissioner(Appeals) also observed that no show cause notice is required under Section 11A(2B). This order of the Commissioner(Appeals) which is under challenge on this appeal of the Revenue.

2. The learned Departmental Representative pleaded that in this case the respondent had clandestinely removed excisable goods against parallel invoices without payment of duty and immediately on detection of this duty evasion, they paid the entire amount of duty without any protest that though in the appeal before Commissioner(Appeals), they challenged the duty demand, The Commissioner(Appeals) without giving any findings on the duty demand simply set aside the order of imposition of penalty and demand of interest on the ground that since entire duty had been paid before the issue of SCN, no penalty is imposable under Section 11AC and no interest is chargeable under Section 11AB, that since the Commissioner(Appeals)'s order was not challenged the order by the respondent, the duty demand cannot be challenged at this stage and that once it is accepted that the goods had been clandestinely cleared against 11 parallel invoices without payment of duty, the interest on duty under Section 11AB and Penalty under Section 11AC would be automatically

attracted. He also cited the Punjab & Haryana High Court's judgment in the case of CCE, Ludhiana vs Omkar Steel Tubes(P) Ltd. reported in 2008(221)ELT-200(P&H) wherein it was held that mere fact that the duty had been paid before the issuance of show cause notice cannot save the party from the provisions of Section 11AC and 11AB. The Hon'ble High Court in this case observed that view taken by Machino Montell Pvt. Ltd.(supra) has been overturned by the Division Bench of this Court in the case of CCE, Delhi-III vs Machino Montell(I) Ltd. reported in 2006(202)ELT.398 and therefore, a mere fact that the duty had been paid before issuance of the show cause notice would not result into the application of Section 11AC of the Act and the penalty could still be imposed as long as various elements envisaged by Section 11AC are satisfied including the presence of mens rea.

2.1 Shri Bipin Garg, Advocate, Ld. Counsel on behalf of the respondent pleaded that though the respondent, in order to avoid further litigation, had paid the duty involved that goods mentioned in the 11 parallel invoices, this does not mean that the Appellant had been accepted the allegation of the Department regarding clandestine of the goods. He pleaded that no enquiry has been made with the customers mentioned in the 11 parallel invoices and as such there is no evidence with the Department that the goods had, indeed, been cleared under those invoices without payment of duty. He also pleaded that in some cases the invoice had been prepared but no goods have been sent to those parties on account of cancellation of the order. He also pleaded that though it was pleaded before the Commissioner(Appeals) that the allegation of clandestine removal has been made without any concrete evidence in this, regard, the Commissioner(Appeals) has not given any finding on this plea. He also cited the Tribunal's judgment in the case of CCE, Shillong vs Shree Narottam Udyog(P) Ltd. reported in 2003(158)ELT.40 wherein it was held that charge of clandestine removal, being a serious charge , asrequired to be proved beyond doubt on the basis of affirmative evidence.

3. I have carefully considered the submissions from both the sides. I find that the allegation is based on eleven parallel invoices which were recovered from the factory premises on 19.7.01 and respondent at that time, paid the entire duty chargeable on the goods covered by those invoices on 20.7.01. Though they raised plea before the Asstt. Commissioner that the allegation of clandestine removal has been made without any evidence but same was rejected by the AC and thereafter when same plea was made before the Commissioner(Appeals), the Commissioner(Appeals) did not give any finding on this point and simply set aside the order of interest and penalty on the ground that the entire duty has been paid prior to the issue of the show cause notice. The respondent has not challenged the Commissioner(Appeals)'s order and therefore, at this stage, they cannot plead that the allegation of removal of goods against parallel invoices without payment of duty is without any

basis. Once the clandestine removal of excisable goods without payment of duty is accepted, the provision of Section 11AC & 11AB would get attracted. In view of this, the Commissioner(Appeals) order setting aside the imposition of personal penalty and interest is not sustainable. Moreover, I also find that Hon'ble Punjab & Haryana High Court in the case of CCE vs Omkar Steel Tubes(P) Ltd.(supra) has held that mere fact that the duty has been paid before the issuance of the show cause notice would not result into in-application of Section 11AC of the Act and the penalty would still be ~~imposed~~ imposable so long as various element envisaged by Section 11AC including the presence of mens rea. In view of this, Commissioner(Appeals)'s order setting aside the penalty under Section 11AC and interest under Section 11AB is set aside and Revenue's appeal is allowed.

Order dictated in the open Court.

(Rakesh Kumar)
Member Technical

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