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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/93 /2006 – SM [BR] Date 20/01/2009

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

To :
M/S N.K.H.ALLOYS
V & PO-JANDIALI, CHANDIGARH ROAD,LUDHIANA

M/S N.K.H.ALLOYS Appellant
Vs
CCE,LUDHIANA Respondent

I am directed to transmit herewith a certified copy of **Final order** No. 77 / 2009 - **SM[BR]** dated 16.1.2009 passed by the Tribunal under Section 35-C(1)of Central Excises Act, 1944

Assistant Registrar
(SM Appeal Branch)

Copy to :
1. Respondent
CCE,LUDHIANA
RISHI NAGAR,LUDHIANA
2. Adv. / Consult
MR.BIPIN GARG
B-1/1289,A-VASANT KUNJ, NEW DELHI

3 S.D.R
4 ~~J.C.D.R~~.
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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 Delhi – 110 066.
Principal Bench, New Delhi

COURT NO. IV
Excise Appeal No. 93 of 2006 (SM)

[Arising out of the Order-in-Original No. 33/Ldh/05 dated 05/09/2005 passed by The Commissioner, Central Excise, Ludhiana.]

For Approval and signature :
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?	:
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?	:

M/s N.K.H. Alloys — Appellant

Versus

CCE, Ludhiana — Respondent

Appearance

Shri Atul Gupta, C.S. – for the appellant.

Shri R. K. Verma, Authorized Representative (DR) – for the respondent.

CORAM : **Hon'ble Shri Rakesh Kumar, Member (Technical)**

DATE OF HEARING : 08/12/2008.
DATE OF DECISION : 16-01-2009 .

Final Order No. 77/09-SM(BR) Dated : 16-01-09

Per. Rakesh Kumar :-

The Appellant in their factory at Chandigarh Road, Ludhiana, manufacture non-alloy steel ingots falling under Chapter 72 of the Central Excise Tariff. During the period of dispute, i.e. during September 1997 to March 2000 period, they were discharging duty liability under compounded levy scheme under Rule 96 ZO of the Central Excise Rules, 1944. On scrutiny of their RT-12 return from 9/97 – 3/2000 period, it was found that against these total duty liability of Rs. 1,55,00,000/- during this period, they had paid Rs. 1,27,06,001/- (Rs. 37,74,194/- during 9/97 – 3/98 period + Rs. 37,06,000/- during 1998-99 + Rs. 57,25,807/- during 1999 – 2000) resulting in short payment of Rs. 27,93,999/-. Accordingly a show cause notice dated 29/8/02 was issued to the Appellant for recovery of duty under proviso to Section 11 A (1) of the Central Excise Act, 1944 alongwith interest on this amount as per the provisions of Section 11 AB and also for imposition of penalty under Rule 96 ZO (3) (i) of Central Excise Rules, 1944, readwith Section 11AC of the Act. The Appellant replied to the show cause notice pleading that the short paid amount represents the amount of abatement claims for the periods of closure of the factory which are pending with the Commissioner. The Commissioner vide order-in-original dated 30/04/04 adjudicated the above-mentioned show cause notice and confirmed duty demands of Rs. 2,25,806/-, Rs. 4,46,533/- and Rs. 46,774/- for 1997-98, 1998-99 and 1999-2000 respectively after adjusting the quantum of abatement allowed and besides this, imposed penalty of Rs. 4,93,307/- under Rule 96 ZO (3) ibid. The Appellant filed an appeal before CESTAT against the Commissioner's order dated 30/4/04 challenging the methodology of determining the amount of abatement and the Tribunal, vide order-in-appeal dated 30/4/04 remanded the matter for denovo adjudication with certain directions. The impugned order-in-original dated 5/9/05 has been paid by the Commissioner in denovo proceedings by which after redetermining the quantum of abatement, the duty demand of Rs. 2,00,384/- for 1998-99 and Rs. 46,238/- for 1998-99 and Rs. 26,238/- for

1999-2000 was confirmed and penalty of Rs. 2,46,620/- was imposed on the Appellant under Rule 96 ZO (3). The present appeal has been filed against this order of the Commissioner.

2. Heard both the sides.

2.1 Shri Atul Gupta, Company Secretary, the learned Counsel for the Appellant made the following submissions :-

> (1) Show cause notice dated 29/08/02 demanding short paid duty for period from September 1997 to March 2000 has been issued by invoking proviso to Section 11 A (1) for which there is absolutely no justification as throughout this period, RT-12 returns had been filed mentioning the amount payable as per the monthly duty liability determined and the amount paid. The short payment was on account of dispute ~~once~~ over the quantum of abatement for the period of closure of the unit. Therefore there is no suppression of fact, fraud or wilful misstatement and the duty demand, as such, is time barred. Hon'ble Punjab and Haryana High Court in case of **CCE, Chandigarh – I vs. M/s Dhiman Steel Rolling Mills**, has held that the recovery of arrears of revenue, resulting on account of non-discharge of monthly duty liability under Rule 96 ZP is subject to the provisions of Section 11A and the compliance of the provisions of Section 11A is mandatory.

(2) The show cause notice has been issued after deletion of Section 3A w.e.f. 1/4/2000 without any saving clause. Therefore w.e.f. 1/4/2000, Rule 96 ZO ceases to be supported by the provisions of the Central Excise Act. Even if it is assumed ~~assured~~ that Rule 96 ZO was saved by Section 38A of the Central Excise Act, then the Explanation to Section 132 of the Finance Act, 2001 provides that – "for removal of doubts, it is hereby declared that no act or omission or the part of any person shall be punishable as an offence which would not have been so punishable if this section had not come into force". Therefore, after 31/3/2000, show cause notices could be issued only for duty demand, not for penalty. In this regard reliance is placed on Tribunal's judgment in case of **Asean Aromatics Pvt. Ltd. vs. CCE, Chennai** reported in **2008 (88) R.L.T. - 669**.

(3) The above points, being points of law, can be raised at any stage. Moreover since the removal of this matter for denovo adjudication was on the point of abatement only the above points were not considered by the Commissioner.

2.2 The learned Departmental Representative made the following submissions :-

(1) The places of limitation and repeal of Section 3A w.e.f. 1/4/2000 without saving clause were not raised

before the adjudicating authority or the Tribunal earlier. Therefore, these points cannot be raised now.

(2) The duty demand is not time barred. As per Tribunal Larger Benches judgment in case of **Mohinder Steels Ltd. vs. CCE, Chandigarh** reported in **2002 (145) E.L.T. – 290**, the time limit prescribed in Section 11A is not applicable to a unit working under compounded levy scheme.

(3) In any case, there was suppression of facts and therefore the demand is not time barred and the penalty has been rightly imposed.

3. I have carefully considered the submissions from both the sides. The show cause notice for duty demand for September 1997 to March 2000 period was issued on 29/8/02 invoking extended period under proviso to Section 11A (1) of the Central Excise Act. The show cause notice also seeks imposition of penalty on the Appellant under Rule 96 ZO (3) of Central Excise Rules, 1944 readwith Section 11AC of the Act. The ground for invoking extended limitation period mentioned in para 4 and 5 of the show cause notice.

3.1 However, the question as to whether the duty demand is within the limitation period prescribed in Section 11A or not was not considered either during the first round of adjudication resulting in issue of order dated 30/4/04 nor during the second round of adjudication in pursuance of the Tribunal's order dated 31/12/04, which resulted in issue of the impugned order-in-original dated 5/9/05. IN the adjudication order 30/4/04, the Commissioner did not consider the applicability of the limitation period under Section 11A, even though the show cause notice had been issued by invoking extended period prescribed under proviso to Section 11A (1) in view of Tribunal's judgment in case of Mohinder Steels Ltd. vs. CCE (supra). However, Hon'ble Punjab & Haryana High Court, which is the jurisdictional High Court for this case, vide judgment dated 8/1/04 CCE, Chandigarh – I vs. Dhiman Steel Rolling Mills (Central Excise reference No. 123/2002), relying upon Hon'ble Supreme Court's judgment in case of **Metal Forgings vs. Union of India** reported in **2002 (146) E.L.T. – 241 (S.C.)** has held that compliance with the provisions of Section 11A of the Central Excise Act is mandatory for effecting recovery of arrears of revenue resulted on account of non-discharge of duty liabilities provided under Rule 96 ZP. The above judgment of Hon'ble Punjab & Haryana High Court has been followed by this Tribunal in case of **CCE, Chandigarh vs. Ashok Steel Industries** reported in **2007 (220) E.L.T. 969 (Tri. – Del.)**. Though the ground of limitation is not incorporated in the Memorandum of appeal, and has been raised in course of arguments, as per Hon'ble Madras High Court's judgment in case of **Dy. Commissioner (CT) Coimbatore Division vs. TVL Pankaja Mills** reported in **1989 (43) E.L.T. – 259 (Mad.)**, the grounds taken during the course of arguments are to be considered by the Appellate authority, even if the grounds are not incorporated in the memorandum of appeal and the Appellate authority is competent to remand the case on the grounds which are not specifically taken in the grounds of appeal or before the lower authorities. Since the question as to whether the duty demand raised vide show cause notice dated 29/8/02 was within time or time barred was not considered by the Commissioner, this issue has to be decided by the Commissioner for which the matter has to be once again remanded.

4. As regards the penalty the Appellant's pleas are that –

(a) since the duty demand is linked with the abatement claim, if the abatement claims are rejected, it does not mean that the Appellant failed to discharge duty liability within time ; and

(b) since show cause notice dated 29/8/02 was issued after repeal of Section 3A w.e.f. 1/4/2000 without saving clause though Section 38A was introduced in the Central Excise Act – by Section 132 of the Finance Act, 2001 w.e.f. 11/5/01, providing for protection, with retrospective effect, for action taken by the Department under Rules, notifications, orders, etc. amended, superseded, rescinded, repealed, etc. in view of Tribunal's judgment in case of Asean Aromatics Pvt. Ltd. vs. CCE, Chennai (supra) by virtue of retrospective operation of Section 38A only the short paid duty could be recovered but penal proceedings could not be initiated.

4.1 I find that Tribunal in case of **CCE, Ludhiana vs. Sardar Associates** reported in **2007 (219) E.L.T. 507**, relying upon its earlier judgments in cases of **Karmyogi Dyeing Pvt. Ltd. vs. CCE, Mumbai – VI** reported in **2001 (136) E.L.T. 639 (Tri. – Mumbai)** and **Vishesh Dhatu**

Industries vs. CCE, Surat reported in **2003 (161) E.L.T. 745 (Tri. – Mumbai)**, has held that when delayed payment is only on account of pendency of abatement claim, no penalty is imposable under Rule 20 (3).

4.2 Since the Tribunal's judgments in cases of Asean Aromatics Pvt. Ltd. vs. CCE, Chennai (supra) and CCE, Ludhiana vs. Sardar Associates (supra) have not been considered by the adjudicating authority, the issue of penalty, if the duty demand is held to be not ~~based~~ barred by limitation, must be decided by the Commissioner in the light of the above-mentioned judgments.

5. In view of the above discussion, the impugned order is set aside and the case is remanded to Commissioner for denovo adjudication on the issue of limitation and penalty, as per the direction in para 3.1 and 4.2 above.

(Pronounced in open court on 16/01/07)

(Rakesh Kumar)
Member (Technical)

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