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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/3868 – 3869 / 2006 –SM[BR] Date 21/07/2009

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

To :
C.C.E. KANPUR
117/7, SARVODAYA NAGAR, KANPUR 208005.

C.C.E. KANPUR Appellant

Vs

M/S HANS METAL PVT. LTD., Respondent

I am directed to transmit herewith a certified copy of **Final order No.** 715 – 716 / 2009 –SM[BR] dated 1.7.2009 passed by the Tribunal under Section 35-C(1)of Central Excises Act, 1944

Assistant Registrar
(SM Appeal Branch)

Copy to :

1. Respondent
1. M/S HANS METAL PVT. LTD.,
2. SHRI SUNIL DHIMAN, AUTH SIGNATORY
INDUSTRIAL AREA, BHARUA SUMERPUR, HAMIRPUR.

2. Adv. / Consult
NONE;-------------

3 S.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
13 Taxmann Allied Service Pvt Ltd.. 21/35. West Punjabi Bagh. New Delhi - 110026
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)
16 Office Copy
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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

EXCISE APPEAL NO. 3868-69 OF 2006-SM

[Arising out of Order-in-Appeal No. 475-476/CE/APPL./KNP/2006 dated 26.9.2006 passed by the Commissioner (Appeals), Central Excise, Kanpur]

For approval and signature:

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

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?	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?	Yes.

CCE, Kanpur — Appellant

Vs.

M/s. Hans Metal (P) Ltd., — Respondent

Appearance:

Shri S. Gautam, DR for the Revenue;
None for the respondents

Coram:

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

Date of hearing/decision: 1st July, 2009

FINAL ORDER NO. 715-716/2009-SM(BR) dated 1.7.09

Per P.K. Das:

Heard learned D.R. on behalf of the Revenue. None appeared on behalf of the respondents.

2. After hearing learned D.R. and on perusal of the records, I find that the respondents are engaged in manufacture of M.S. Bars and Sturctures classifiable under Sub-heading 7214.90 and 7216.90 of the Schedule to the Central Excise Tariff Act, 1985. On 15.9.2004 Central Excise officers visited the respondents' factory and conducted stock verification. The said officers ascertained shortage of finished goods and inputs during stock verification involving central excise duty of Rs. 1,53,165/-. Shri Sunil Dhiman, authorized signatory accepted the shortage and debited the duty immediately. Original authority confirmed the demand of duty and appropriated the amount as deposited by them. He also imposed penalty of equal amount under Section 11AC of the Central Excise Act, 1944. He also imposed penalty of Rs. 25,000/- on Shri Sunil Dhiman, authorized signatory of the respondent company. The Commissioner (Appeals) set aside the penalties on the ground that duty was debited before issuance of show cause notice. Revenue filed these appeals against the order of the Commissioner (Appeals).

3. Learned D.R. submits that the reasoning of the Commissioner (Appeals) cannot be accepted in view of the decision of the Hon'ble Supreme Court in the case of UOI vs. Dharmendra Textile Processors,

reported in 2008 (231) ELT 3 (SC). He submits that representative of the respondents failed to explain the reason for shortage. It is presumed that the goods were cleared clandestinely and, therefore, penalty under Section 11AC of the Act is justified.

4. The findings of the Commissioner (Appeals) insofar as the duty was debited before issuance of show cause notice and, therefore, penalty under Section 11AC of the Act is not imposable. It is well settled that mere fact that duty has been paid before issuance of show cause notice would not result non-application of Section 11AC of the Act. It is required to be looked into as to whether ingredients envisaged under Section 11AC of the Act were available in the present case. It is seen that in the instant case the representative of the respondents failed to furnish any reason for shortage, There is no material available that the goods were cleared clandestinely. The Hon'ble Punjab & Haryana High Court in the case of CCE, Ludhiana vs. Omkar Steel Tubes (P) Ltd., reported in 2008 (221) ELT 200 (P&H) held that penalty would be imposable as long as various elements envisaged under Section 11AC are satisfied including mens rea. In the said case representative of the assessee failed to furnish the reasoning for shortage and the original authority imposed penalty of equal amount on the basis of statement. Hon'ble High Court observed that such a statement cannot be regarded as sufficient to conclude that the goods were cleared clandestinely. In any case, no finding has been recorded that there was mens rea on the part of

the Director respondent and, therefore, Hon'ble High Court upheld the order of the Tribunal and dismissed the appeal filed by the Revenue. In the present case, there is no evidence that the goods were cleared clandestinely.

5. In view of the above discussion, I find that imposition of penalty under Section 11AC of the Act is not warranted. Accordingly, I do not find any reason to interfere with the order of the Commissioner (Appeals). Both the appeals filed by the Revenue are rejected.

(Dictated & pronounced in the Open Court.)

(P.K. DAS)
MEMBER (JUDICIAL)

RK