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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/2489/2007 – SM[BR] Date 27/08/2009

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 USHA MARTIN CONSTRUCTION STEEL LTD. Respondent

I am directed to transmit herewith a certified copy of **Final order No.** 1088 / 2009 –SM[BR] dated 12.8.2009 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 USHA MARTIN CONSTRUCTION STEEL LTD.
   12/16, NAWALGANJ, AGRA.
2. Adv. / Consult SHRI RAVI RAGHAVAN ADV.
   B-6/10, SAFDARJUNG ENCLAVE NEW DELHI

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
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Assistant Registrar
(SM Appeal Branch)

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
WEST BLOCK NO.II, R.K. PURAM, NEW DELHI-110066.
BENCH-DB

Appeal No.E/2489/07-SM

[Arising out of Order-in-Appeal No.200-CE/APPL/KNP/2007 dated 30.05.2007 passed by the Commissioner (Appeals), Kanpur]

Date of Hearing:12.08.2009
Date of decision: 12.08.2009

CCE, Kanpur ...Appellant

Vs.

M/s. Usha Martin Construction Steel Ltd. ... Respondent

Present for the Appellant :Shri. I.Baig, DR
Present for the Respondent:Shri. Ravi Raghavan, Advocate

CORAM: HON'BLE MR. RAKESH KUMAR, TECHNICAL MEMBER

Final **ORDER NO.** 1088/2009 SM (BR) **DATED:12.08.2009**

PER: RAKESH KUMAR

This is revenue's appeal against order in appeal No.200-CE/APPL/KNP/2007 dated 30.05.07 by which Commissioner (Appeal set aside the order in original NO.95-AC/Adj/2006 dated 29.09.06 passed by the Asstt. Commissioner. The respondent manufactures HSD Bars of iron and steel chargeable to Central Excise duty under sub heading 72142090 of Central Excise Tariff. The respondent's factory was visited by the Jurisdictional Central Excise Officers on 24.12.2005 and they conducted physical verification of finished material (HSD Bars) as well as raw-material. While the R.G.I Register was showing total stock of 148.30 MT of 12 MM HSD Bars, the actual stock was found to be 175.950 M.T. There was thus, an excess stock of 27.560 M.T. in respect of HSD Bars of 12M.M. In respect of HSD Bars of 16 M.M. as against RGI register balance of 49.115 MT actual stock was found to be 94.115 M.T. and then there was 45 M.T. excess stock. Thus a total excess quantity of 72.560 M.T. was found over and above the recorded balance in RG-I. The value of the excess stock was about Rs.14.49 Lakhs. Since the explanation given by the respondent, at that time, for the excess stock was not found satisfactory, the goods were seized. Thereafter a show cause notice was issued. The Asstt. Commissioner passed an order in original No.95-AC/Adj/2006 dated 29.9.2006 by which – the excess stock of 72.560 M.T. of HSD Bars valued at Rs.14,79,910 Lakhs which had been placed under seizure was ordered to be confiscated under Rule 25 (1) of Central Excise Rules 2002 and since goods had already been released against Bank Guarantee, the Bank Guarantee was appropriated. The penalty of Rs.2,41,520/- was imposed on the respondent under rule 25 (1) of Central Excise Rules 2002 read with Section 11AC of Central Excise Act, 1944. The Commissioner (Appeals) in his order in appeal No.200-CE/APPL/KNP/2007 dated 30.05.07 relying upon the Board's Circular No.480/52/99-CX dated 23.09.99 and also the judgement of the Tribunal in the case of Bhilai Conductors (P) Ltd. vs. Commr. reported in 2000 (125) ELT 781 held that the confiscation of unaccounted goods is not sustainable in absence of any substantial evidence of clandestine clearance or any intention that the goods were kept for clandestine removal and no penalty is impossable and accordingly set aside the Asstt. Commissioner's order. It is against this order of Commissioner (Appeals) that present appeal has been filed by the Deptt for restoration of the order in original passed by the Asstt. Commissioner.

2. Heard both sides.

2.1 Shri I.Baig, ld. DR pleaded that the item being manufactured by the respondent - HSD bars are an evasion prone item and therefore serious view has to be taken in respect of any unaccounted stock or shortage vis-à-vis in the balance of RG-I Register, that the Respondent manufacture HSD Bars of Iron & Steel which are weighed and the finished product, that is, HSD bars, are also weighed at the time of removal and in view of this, excess stock to this extent is not possible, that from this, it is clear that there was an intention to clear the goods clandestinely, that while the excess stock in respect of 12 MM HSD bars is about 20 %, the excess stock in respect of 16 MM bars, is about 100%, that the Board's Circular No.480/52/99-CX dated 23.09.99 is meant for integrated steel plants and the same is not applicable for the unit of the respondent, that as the circumstances mentioned in the Board's Circular in respect of the integrated steel plants are not present in this case, the same is not applicable, that the excess stock noticed in respect of 12MM and 16MM HSD Bars is real and looking to the extent of the excess stock a serious view has to be taken; that since the respondent have failed to maintain correct stock of finished goods as per provisions of Central Excise Rules, they are liable for penalty under Rule 25 (1) (b) of Central Excise Rules, that Rule 25 (1) (b) is identical to the rule 173Q (1) (a) of Central Excise Rules 1944, that the Hon'ble Bombay High Court in the case of Kirloskar Brothers Ltd. vs. Union of India & Others reported in 1988 (34) ELT 30 (Bom.) has held that for imposition of penalty under clause (a) , (b) & (c) and of sub-rule (1) of Rule 173Q of Central Excise Rule 1944, mens-rea is not required to be proved as mere contraventions as mentioned in the clauses are sufficient for penal liability, that the same view has been taken by the Tribunal in the case of CCE vs. Magnum Steels Ltd. reported in 2006 (197) ELT 572 (Tri.- Del) and also by Tribunal in the case of PNP Castings

(P) Ltd. vs. CCE, Lucknow reported in 2006 (194) E.L.T. 250 (Tri. Del.) and that in view of the above, Commissioner (Appeals)'s order is not correct.

2.2 Shri Ravi Raghavan, Advocate, the ld. Counsel for the respondent, pleaded that the excess stock in respect of 12 MM and 16 MM bars is not liable to confiscation, that in the respondent's Volumetric plant, the stock of the finished goods is determined on basis i.e. by deducting the burning loss and processing loss from the weight of the raw material, that while the weighment of finished goods at the time of their entry in RG-I register is not done and some approximate weight is recorded, The weight of goods at the time of removal is recorded after actual weighment, that since the waighment of finished goods is recorded in the RG I Register by estimation, over a period of time, there may be some difference between the weight recorded in RG-I register and actual weight, that due to this reason only, a marginal difference occurred resulting in excess quantity of physical stock constituting 0.16% of their annual production, that as per the Board's Circular No.480/52/99-CX dated 23.09.99 such shortage upto 2 % can be condoned, that in any case since there is no evidence that there was intention on the part of the respondent to remove the goods clandestinely, penalty under rule 25 (1) cannot be imposed, as from the very language of Rule 25, it is clear that penal provision under this rule would be attracted only when the elements for imposition of penalty under section 11AC are present and that in this regard he relies on Tribunal's judgement in the case of Bhilai Conductors (P) Ltd. vs. Commr. reported in 2000 (125) ELT 781 wherein it was held that confiscation is not attracted for mere non-accountal of the RGI Register when there is no evidence that such non-accountal of goods still in the factory was with intent to evade payment of duty. In view of the above, he pleaded that the impugned order does not merit any interference.

3. I have carefully considered the submissions from both sides and perused the records. Even though the weight of the finished goods is determined by estimation and is mentioned in the RGI Register on this basis since the weight of raw material, that is, ingots is physically determined and there after the weight of the finished goods is also physically determined, the variations in the stock of finished goods in the bonded store to the extent noticed in respect of 12 MM and 16MM bar is not possible as in respect of 12mm bars the excess stock was 20% and in respect of 16 MM has the excess was to the extent of 100%. The appellant have not given any satisfactory explanation for this. If the explanation given by the respondent is correct, similar variation should have been uniformly found in respect of the other verities of bars which is not so. In view of this, I hold that the excess detected in respect of 12 mm and 16 mm bars is real and as such and the Respondents have not given any satisfactory explanation for the same. On going through the Board's Circular No.480/52/99-CX dated 23.9.99 I am of the view that the same is applicable to integrated steel plants, not to the Respondents' units. Thus, the respondents are guilty of not maintaining the stock of the finished goods properly and provisions of rule 25 (1) (b) would be attracted. While Tribunal in the case of Bhillai Conductors (P) Ltd. vs. Commr. reported in 2000 (125) ELT 781 has held that the confiscation would not be attracted for mere non-accountal of the finished goods in RG I Register when there is no evidence that such non-accountal of goods, still in the factory, was with intent to evade payment of duty, the Hon'ble Bombay High Court in the case of Kirloskar Brothers Ltd. (supra) has taken contrary view holding that for imposition of penalty under clause (a)

(b) & (c) of Rule 173 Q (1) of Central Excise Rules 1944, no mens-rea is required and mere of non-accountal of finished goods in RGI Register would attract confiscation and penalty. Same view has been taken by the Tribunal in the case of CCE, Indore vs. Magnum Steels Ltd. (supra) and PNP Castings (P) Ltd. (supra). In view of settled legal position on this issue, I hold that the respondent are liable for penalty and the excess stock was liable for confiscation and the Commissioner (Appeals)'s order setting aside the order of confiscation of excess stock and penalty on the respondent is not correct. In view of this, the impugned order is set aside and the order in original passed by the Asstt. Commissioner is restored. The revenue's appeal is allowed.

[Dictated & Pronounced in the open Court].

(RAKESH KUMAR)
TECHNICAL MEMBER

Anita