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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/30 - 31 / 2007 -SM[BR] Date 12/10/2009

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

To :
C.C.E.KANPUR

117/7, SARVODAYA NAGAR, KANPUR.

C.C.E.KANPUR Appellant

Vs

M/S JAGDISH ROLLING WORKS Respondent

I am directed to transmit herewith a certified copy of **Final order No**. 1228 – 1229 / 2009 -SM[BR] dated 20.8.2009

passed by the Tribunal under Section 35-C(1)of Central Excises Act, 1944

Assistant Registrar
(SM Appeal Branch)

Copy to :

1. Respondent
1. M/S JAGDISH ROLLING WORKS
2. SH HARPINDER SINGH,AUTHORISED SIGNATORY
93-A, FACTORY AREA, FAZALGANJ, KANPUR
2. Adv. / Consult
MR.K.K ANAND
A-5,BASEMENT,LAJPAT NAGAR-III NEW DELHI-24
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
17 Guard file

Assistant Registrar
(SM Appeal Branch)

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
WEST BLOCK NO. 2, R.K. PURAM, NEW DELHI

COURT – III

CENTRAL EXCISE APPEAL NO. 30-31 OF 2007-SM

[Arising out of Order-in-Appeal No. 501-CE/APPL/KNP/2006 dated 13.10.2006 passed by the Commissioner (Appeals) Custom & 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?	No
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?	No
4.	Whether order is to be circulated to the Departmental authorities?	Yes

Commissioner,
Customs & Central Excise, Kanpur — Appellant

Vs.

1) M/s. Jagdish Rolling Works,
2) Shri Harpinder Singh — Respondents

Appearance:

Shri I. Baig, SDR for the Revenue;
Shri K.K. Anand & Ms. Asmita Nayak, Advocates for the assessee

Coram:

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

Date of hearing/decision: 20th August, 2009

FINAL ORDER NO. 1228 - 1229 / 2009 **dated** SM (BR)

Per P.K. Das:

These appeals arise out of common order and, therefore, both are being taken up together for disposal.

2. The relevant facts of the case, in brief, are that the respondents are engaged in the manufacture of Angle and Rectangular Bars of Iron and Steel classifiable under Sub-heading 7216.90 and 7214.90 of the Schedule to the Central Excise Tariff Act, 1985. On 10.7.2004, the Central Excise officers visited the factory of the respondents and conducted stock verification. The said officers ascertained shortage of finished goods as well as raw material involving central excise duty of Rs. 1,49,174/-. Shri Harpinder Singh, authorized signatory of the respondent company admitted the shortage and deposited the duty immediately on 10.7.2004 & 14.7.2004. Original authority confirmed the demand of duty and appropriated the amount deposited by them. However, he has not imposed penalties on the respondents. Revenue filed appeal before the Commissioner (Appeals), which were rejected. Hence, the Revenue filed these appeals.

3. Learned D.R. on behalf of the Revenue submits that respondent No. 2, the authorized signatory of the company admitted the shortage and

also stated in his statement that the finished goods were cleared from the factory premises without payment of central excise duty. Regarding shortage of raw material, it was stated by the authorized signatory that it was occurred on account of manipulation by the staff in his absence and they have cleared the said goods without any proper document. He submits that it is a clear case of clandestine removal of the goods and penalty under Section 11AC is liable to be imposed on Respondent company. He also submits that the original authority erroneously proceeded on the basis of Section 11A (2B) of the Central Excise Act, 1944 which is not applicable in the case of clandestine removal of the goods. He further submits that the Commissioner (Appeals) rejected the appeal filed by the Revenue merely on the ground that the duty was deposited before the issue of show cause notice. It is his submission that the Commissioner (Appeals) followed the decision of the Larger Bench of the Tribunal in the case of Machino Montell (I) Ltd., reported in 2004 (168) ELT 466 (Tri. – LB) which is overruled by the Hon'ble Punjab & Haryana High Court as reported in 2006 (202) ELT 398 (P&H). He also submits that the goods were clandestinely removed and, therefore, penalty is imposable on the respondent company as well as its authorized signatory.

4. Learned Advocate on behalf of the respondents reiterates the finding of the Commissioner (Appeals). She submits that the original authority restrained from imposition of penalty as they had deposited the

duty before issuance of show cause notice. She submits that Section 11A (2B) of the Act provides that, when any duty of excise has not been levied or nor paid or has been short levied or short paid, may pay the amount of duty (on the basis of own assessment of such duty or on the basis of duty ascertained by the central excise officer) before service of show cause notice on him, the proper officer shall not serve any notice under Sub-section (1) of the said section. She also submits that there was no clandestine removal of the goods. It is her contention that staff of the respondent company cleared the goods without the knowledge of the respondent company which could not be treated as clandestine removal of the goods. She relied upon the decision of 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).

5. After hearing both sides and on perusal of the records, I agree with the submission of the learned D.R. that mere fact that duty has been paid before issuance of the show cause notice would not result in inapplicability of section 11AC and penalty could still be imposed as long as various elements envisaged by Section 11AC of the Act are satisfied including presence of mens rea. It is seen that explanation (1) of Sub-section 2(2B) of section 11A provides that nothing contained in this sub-section shall apply in a case where duty was not paid by reasons of fraud, collusion or any mis-statement or suppression of fact or contravention of any of the provisions of this Act or Rules made

thereunder with intent to evade payment of duty. I find that in the present case the original authority did not impose penalty following Section 11A(2B) of the Act and failed to consider Explanation (1) of the said Sub-section. Similarly, Commissioner (Appeals) also upheld the adjudication order following the decision of the Larger Bench of the Tribunal, which is overruled by the Hon'ble Punjab & Haryana High Court. So, both the authorities below passed the order without considering the facts of the case on merit. Hence, it will be proper if the matter is sent back to the original authority to decide afresh after considering the facts of the case on merits.

6. In view of the above discussion, the impugned orders are set aside and the matter is remanded back to the Original authority to decide afresh after considering the case on merits and the case laws. Both the appeals filed by the Revenue are allowed by way of remand.

(Dictated & pronounced in the Open Court.)

(P.K. DAS)
MEMBER (JUDICIAL)

RK