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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/540 /2007 – SM[BR] Date 21/10/2009

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

To :
C.C.E, GHAZIABAD
C.G.O. COMPLEX-II, KAMLA NEHRU NAGAR,
GHAZIABAD
C.C.E, GHAZIABAD Appellant
Vs
ASHOKA METAL DECOR (P) LTD. Respondent

I am directed to transmit herewith a certified copy of **Final order No.** 1300 / 2009 –SM[BR] dated 8.9.2009 passed by the Tribunal under Section 35-C(1)of Central Excises Act, 1944

Assistant Registrar
(SM Appeal Branch)

Copy to :
1. Respondent
   ASHOKA METAL DECOR (P) LTD.
   C-10, MEERUT ROAD, INDL AREA, GHAZIABAD.
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
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. 540 OF 2007-SM

[Arising out of Order-in-Appeal No. 199-CE/GZB/2006 dated 30.11.2006 passed by the Commissioner (Appeals), Central Excise, Ghaziabad]

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, Ghaziabad Appellant

Vs.

M/s. Ashoka Metal Décor (P) Ltd., Respondent

Appearance:

Shri V.K. Saxena, Jt. CDR for the Revenue;
None for the respondent

Coram:

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

Date of hearing/decision: 8th September, 2009

FINAL ORDER NO. 1300/2009-SM (BR) **dated** ________

Per P.K. Das:

The Revenue filed this appeal against the Order of the Commissioner (Appeals) whereby penalty imposed under Section 11AC of Central Excise Act, 1944 was set aside.

2. Heard learned Jt. CDR on behalf of the Revenue. None appears on behalf of the respondents.

3. The relevant facts of the case, in brief, are that the respondents are engaged in the manufacture of 'Crown Corks' classifiable under Chapter 83 of the Schedule to the Central Excise Tariff Act, 1985. On 27th August, 2004, Central Excise officers visited the factory of the respondents and conducted stock verification. The said officers ascertained shortage of raw material as well as finished goods involving central excise duty of Rs. 14,879.50. Shri R.C. Dua, Vice President of the respondent company in his statement accepted the shortage but could not explain the reason for such shortage which shows that the goods were clandestinely removed and, therefore, penalty under Section 11AC is imposable.

4. After hearing learned Jt. CDR and on perusal of the records, I find that the respondents admitted the shortage and deposited the duty on the same day from the Cenvat Credit/PLA account. But, Shri R.C. Dua failed to furnish reason for such shortage. Commissioner (Appeals) set

aside the penalty on the ground that the duty was deposited before issuance of show cause notice. Section 11AC of the Act provides that imposition of penalty for shortage or non-levy of duty by fraud, collusion, willful mis-statement or suppression of facts or contravention of any of the provisions of this Act or Rules made thereunder with intent to evade payment of duty. So, finding, of the Commissioner (Appeals) that duty was deposited before issue of show cause notice and, therefore, penalty cannot be warranted, is not acceptable. However, on perusal of the records, I find no material to show that the goods were cleared clandestinely. Hon'ble Punjab & Haryana High Court in the case of CCE vs. Omkar Steel Tubes (P) Ltd., reported in 2008 (221) ELT 200 (P&H) held that penalty could still be imposed as long as various elements envisaged by Section 11AC of the Act are satisfied including presence of mens rea. In the said case the assessee failed to furnish the reason for shortage and penalty was imposed under Section 11AC of the Act by the Adjudicating authority which was set aside by the Commissioner (Appeals) and subsequently by the Tribunal. The Hon'ble High Court upheld the order of the Tribunal holding that to impose penalty under Section 11AC of the Act, mens rea is essential. In the present case, it has already been observed that there is no material available to prove clandestine removal of the goods and in such situation Section 11AC cannot be invoked.

5. In view of the above discussion, I do not find any reason to interfere with the order of the Commissioner (Appeals). Appeal filed by the Revenue is rejected.

(Dictated & pronounced in the Open Court.)

(P.K. DAS)
MEMBER (JUDICIAL)

RK