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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/1184/2008 & E / 1207 / 2008 -SM[BR] Date **05/01/2011**

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 VACMET PACKAGINGS (INDIA) PVT. LTD. (UNIT-I) Respondent

I am directed to transmit herewith a certified copy of **Final order** No. 15 -16 / 2011-SM[BR] dated 4.11.2010

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 VACMET PACKAGINGS (INDIA) PVT. LTD. (UNIT-I)
B-5, SITE-A, UPSIDC,INDUSTRIAL
AREA,SIKANDRA,AGRA-282007.
2. Adv. / Consult SHRI K.K. ANAND ADV.
A-5 [BASMENT] LAJPAT NAGAR-III
NEW DELHI-24.
3. C.D.R
4. Bar association, CESTAT, New Delhi
5. Director Publications, Customs, Excise. I.P. Estate, New Delhi
6. M/s Centax Publictions Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi -
7. Company Law Institute of India Pvt Ltd.,No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
8. M/s. Deeparchie Publications, M-93, Marg. 46, Saket, New Delhi 110017
9. Taxmann Allied Service Pvt Ltd., 59/32, New Rohtak Road, New Delhi - 110005
10. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road, Ahmedabad-15
11. LAWCRUX Advisors Pvt Ltd. LAW House,1-8,Sector - 10, Faridabad 121003 (Haryana)
12. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
13. Office Copy
14. Guard file

Assistant Registrar
(SM Appeal Branch)

[2] M/S AISHWARYA ISPAT PVT.LTD.
INDUSTRIAL AREA, BHARWA SUMERPUR, HAMIRPUR

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

Excise Appeal No.1184 of 2008-SM

Excise Appeal No.1207 of 2008-SM

(Arising out of Order-in-Appeal No.128-CE/APPL/KNP/2008 and No.121/CE/APPL/KNP/2008 dated 24.3.08 passed by the CCE & C (A), Kanpur)

Date of Hearing: 04.11.2010
Date of Decision: 04.11.2010

For approval and signature:
Hon'ble Mr.Ashok Jindal, 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 should 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 Departmental authorities?	

CCE, Kanpur — Appellant

Vs.

M/s.Vacmet Packagings (India) Pvt.Ltd. — Respondent
M/s.Aishwarya Ispat Pvt.Ltd.

Present for the Appellant: Shri B.L.Soni, SDR
Present for the Respondent: Shri G.K.Sarkar, Advocate for respondent No.1 and none for respondent No.2.

Coram: Hon'ble Mr.Ashok Jindal, Member (Judicial)

Final **ORDER NO.** 15-16/2011 SM (BR)

PER: ASHOK JINDAL

The Revenue is in appeal against the impugned order dropping mandatory penalty under Section 11AC of Central Excise Act, 1944.

2. In the impugned order, the Commissioner (Appeals) has dropped penalty relying on the decision of Hon'ble High Court in

the case of Sigma Steel Tubes reported in 2007 (218) ELT (P&H) wherein the Hon'ble High Court relying on the decision of the Apex Court in case of Rashtriya Ispat Nigam Ltd. observed that in the absence of any corroborative evidence in cases of shortages in the stocks of goods found in a factory, it is not clear whether the same was on account of clandestine removal or on account of wrong accounting or the clerical mistake etc.. Hence, no penalty is imposable, once a duty has been paid before the issue of show cause notice.

3. The brief facts of the case are that during the visit of the preventive officers in the factory premises of the respondents, they found the goods were short in the stock of finished goods and raw materials. The authorised signatory was failed to explain the shortages but he had admitted the shortages and paid duty thereon. The Adjudicating authority confirmed the duty on the shortages and imposed equal amount of penalty on the respondents. On appeal before the Commissioner (Appeals), the duty was confirmed but penalty was dropped. Aggrieved by the said order, the Revenue is in appeal before this Tribunal.

4. Learned SDR submitted that in the case of Rashtriya Ispat Nigam Ltd, the Hon'ble Supreme Court held that when the duty has been confirmed where it was detected by the authorities and the same has not been paid, by way of fraud, collusion, mis-statement, suppression of facts, or any contravention of the provisions of law with intent to evade duty, mandatory penalty under Section 11AC is leviable on the assessee. In this case, the shortages were found during the visit of the preventive officer the factory premises of the respondents and the respondents

have failed to explain the same and they have suppressed the facts from the department, the mandatory penalty under Section 11AC leviable on the respondents.

5. On the other hand, learned Advocate for the respondents submitted that the Hon'ble Supreme Court in the case of Rashtriya Ispat Nigam Ltd. has clearly observed that in the absence of any corroborative evidence in cases of shortages in the stocks of goods found in a factory, it is not clear whether the same was on account of clandestine removal or on account of wrong accounting or the clerical mistake etc.. Hence, no penalty is imposable, once a duty has been paid before the issue of show cause notice.

6. Heard and considered.

7. Learned Advocate for the respondents submitted that in their own case on identical facts, this Tribunal has held that when the authorised signatory could not offer any satisfactory explanation for the shortage. No evidence of removal of the goods from the factory has been relied upon. The penalty is not imposable under Section 11AC.

8. On careful examination of the submissions made from both sides, the short dispute in this case is whether the assessee is liable for penalty under Section 11AC on the shortages which he could not explain the shortage during the course of investigation or not.

9. In the respondents' own case, this Tribunal has held that when the authorised signatory could not offer any satisfactory

explanation for the shortage. No evidence of removal of the goods from the factory has been relied upon. The penalty is not imposable under Section 11AC. In the case of Rashtriya Ispat Nigam Ltd, the Hon'ble Supreme Court has held that the evasion of duty must be by way of fraud, collusion, mis-statement, suppression of facts, or any contravention of the provisions of law with intent to evade duty, mandatory penalty under Section 11AC is leviable on the assessee.

10. In this case, the Revenue could not establish clandestine removal of the goods found short with intent to evade duty or suppression of facts. Hence, following the ratio laid down in the respondents' own case, I do not find any merits in the Revenue's appeals and the same are rejected.

(Pronounced in the open court)

(ASHOK JINDAL)
MEMBER (JUDICIAL)

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