TI[redacted]RAM : CEGCANAL
W[redacted]e : www.cestat.gov.in

REGISTERED / AD
Email : delhi@cestat.gov.in

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/597 /2009,953 /2009 – SM[BR] E /CO / 188 / 2009-SM[BR] Date **05/01/2011**

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

To :
C.C.E. LUCKNOW

7-A, ASHOK MARG, LUCKNOW.

C.C.E. LUCKNOW Appellant

Vs

M/S B.M.W. STEELS LTD., Respondent

I am directed to transmit herewith a certified copy of **Final order No**.22 – 23 / 2011-SM[BR] dated 20.10.2010 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 B.M.W. STEELS LTD.,
SADABAD GATE, HATHRAS.

2. Adv. / Consult SHRI BIPIN GARG ADV.
B-1/1289-A, VASANT KUNJ NEW DELHI

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)

3. B.M.W. STEELS LTD.
SADABAD GATE, HATHRAS

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI
Court No.IV

E/Appeal Nos. 597 & 953/09, E/CO 188/09-SM

(Arising out of order in appeal No.211/CE/LKO/08 dated 16.12.2008 passed by the Commissioner of Central Excise (Appeals), Lucknow)

Date of Hearing: 20.10.2010

For approval and signature:

Hon'ble Shri Ashok Jindal, Member (Judicial)

1. Whether Press Reporters may be allowed to see 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?

E/Appeal No. 597/2009

CCE, Lucknow — Appellants

Vs

M/s B.M.W. Steels Ltd — Respondent

E/Appeal No. 953/09

M/s B.M.W. Steels Ltd M/s B.M.W. Steels Ltd — Appellants

Vs

CCE, Lucknow — Respondent

Appeared for the Appellant: Shri K.P. Singh, SDR

Appeared for the Respondent: Shri Bipin Garg, Advocate

Coram: **Hon'ble Shri Ashok Jindal ,Member (Judicial)**

Final ORDER 22-23 / 2011 SM (BR)

Per Ashok Jindal:

Both the sides filed appeal against the impugned order.

2. The facts of the case are that during the course of visit at the factory premises of the assessee, it was found that 90 pieces of 250 NB CI Sleeve Coupling were found in excess on physical verification of the stocks which was not accounted by them in their daily account stock register. Accordingly, the same were confiscated and allowed to be redeemed on a redemption fine of Rs. 25,000/- and the penalty under Rule 25 of Central Excise Rules 2002 was also imposed. On appeal before the Commissioner (Appeals), the Commissioner (Appeals) confirmed the confiscation but reduced the penalty to Rs. 10,000/-. Aggrieved from the reduction of penalty, Revenue has filed the appeal. Aggrieved from the confiscation and imposition of penalty, the assessee also filed the appeal.

3. Shri Bipin Garg, learned Advocate appearing on behalf of the assessee submitted that during the course of physical verification of the stock, the assessee has explained that the goods found in excess were not entered in their daily stock account by mistake of the dealing clerk and there was no malafide intention of the assessee to clear these goods without payment of any Central Excise duty and nothing has been corroborated by the Revenue to alleged malafides. Hence the confiscation and penalties are not warranted. He also submitted that at the most, penalty can be imposed under Rule 27 on procedural lapse.

4. On the other hand, learned DR submitted that for confiscation and imposition of penalty under Rule 25 (1)(b) of Central Excise Rules, 2002, malafide intention is not required as the same are inbuilt in the contravention made by the assessee. He also relied on the UOI Vs Dharmendra Textile Processors reported in 2008 (231) 3 (S.C) wherein the Hon'ble Apex Court has held that no discretion available for quantum of penalty under Section 11AC of the Central Excise Act. Mens rea is not an essential ingredient thereunder.

5. Heard both the sides. I have considered the submissions made by both the sides in detail. In this case, the allegation against the assessee is that they have not entered the finished goods in their daily stock account register. It is not alleged against the assessee that these goods were not entered in their stock account register with the intention to remove clandestinely. Moreover, the Rule 25 of Rules 2002 reads as under:-

"Rule 25. Confiscation and penalty - (1) Subject to the provisions of section 11AC of the act, if any producer, manufacturer, registered person of a warehouse or a registered dealer, -

(a) removes any excisable goods in contravention of any of the provisions of these rules or the notifications issued under these rules, or

(b) does not account for any excisable goods produced or manufactured or stored by him; or

(c) engages in the manufacture, production or storage of any excisable goods without having applied for the registration certificate required under section 6 of the Act; or

(d) Contravenes any of the provisions of these rules or the notifications issued under these rules with intent to evade payment of duty,

Then, all such goods shall be liable to confiscating and the producer or manufacturer or registered person of the warehouse or a registered dealer, as the case may be, shall be liable to a penalty not exceeding the duty on the excisable goods in respect of which any contravention of the nature referred to in clause (a) or clause (b) or clause (c) or clause (d) has been committed, or rupees ten thousand, whichever is greater.

On a bare reading of Rule 25, the confiscation and penalty can be imposed subject to the provision to Section 11AC of the Act. Accordingly, for confiscation and imposition of penalty, first we have to see whether the act of the assessee is of fraud, collusion, wilful misstatement, suppression of fact or any contravention of the provisions of law with an intention to evade duty, which is missing in this case. The reliance of learned DR also relied on the decision of Dharmendra Textile Processors is of no help as the issue before the Hon'ble Apex Court was quantum of mandatory penalty. In fact, there is a provision for levy of mandatory penalty under Section 11AC of the Act if it is found that the act is of fraud with intent to evade duty. In that case, there is no such discretion to reduce the penalty. The said issue has been dealt by the Supreme Court in the case of Rajasthan Spinning & Weaving Mills reported in 2009 (238) ELT 3 (SC) wherein in para 23 and 24 of the said decision, the Hon'ble Apex Court has dealt the issue which are reproduced here as under:-

"23. The decision in Dharmendra Textile must, therefore, be understood to mean that though the application of section 11AC would depend upon the existence or otherwise of the conditions expressly stated in the section, once the section is applicable in a case the concerned authority would have no discretion in quantifying the amount and penalty must be imposed equal to the duty determined under sub-section (2) of section 11A. That is what Dharmendra Textile decides.

24. It must however, be made clear that what is stated above in regard to the decision in Dharmendra Textile is only in so far as section 11AC is concerned. We make no observations (as a matter of fact there is no occasion for it) with regard to the several other statutory provisions that came up for consideration in that decision."

8. Moreover, in the case of CCE Ahmedabad Vs Ranak Laminax (P) Ltd reported in 2008 (232) ELT 861 Ahmedabad, the Tribunal has held that in case of non-accountal of goods which are lying in the factory and non-entry in the statutory record, they cannot be confiscated without proof of malafide intention to clear them without payment of duty. Hence no confiscation and penalty is warranted. Same view was taken by this Tribunal in Amrut Ceramics reported in 207 (209) ELT 390 (Tri.Ahmd). In the present case also, the allegation against the assessee is that they have not accounted 90 pieces of sleeve in their daily stock account register but there is no allegation against the assessee that these goods were not entered in the daily stock with intention to clear them without payment of duty. Hence following the

decisions of the Tribunal in the case of Ronak Laminax (P) Ltd (supra) and Amrut Ceremics (supra), I hold that in this case also, the confiscation and penalty is not warranted under Rule 25 of Central Excise Rules 2002. Hence the impugned order for confiscation and imposition of penalty under Rule 25 is set aside. But as submitted by the learned Advocate, it is a procedural lapse of the Central Excise provision. Hence, the penalty under Rule 27 can be imposed. Accordingly, penalty under Rule 27 is imposed to Rs. 2,000/-.

9. With these observations, the appeals filed (by the Revenue and assessee) are disposed of and the cross objections are also disposed of in the above manner.

(ASHOK JINDAL)
Judicial Member

MPS*