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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/2030 - 2031/2009 – SM [BR]** Date **09/06/2011**

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

To :
M/S BIRD AUDIO ELECTRONICS,
KHASRA NO. 61, JHARODA MAJRA BURARI,
DELHI-84

M/S BIRD AUDIO ELECTRONICS, Appellant
Vs
C.C.E. DELHI I Respondent

I am directed to transmit herewith a certified copy of **Final order No. 302 – 303/2011-SM[BR]** dated 7.6.2011 passed by the Tribunal under **Section 35-C(1)of Central Excises Act, 1944**

Assistant Registrar
(SM Appeal Branch)

Copy to :

1. Respondent
C.C.E. DELHI I
C.R. BUILDING, I.P. ESTATE, NEW
DELHI 110002

2. Adv. / Consult
MR.NAVEEN MULLICK,ADV
B-388, MEERA BAGH, N.DELHI

3. C.D.R
4. Bar association, CESTAT, New Delhi
5. Director Publications, Customs, Excise. I.P. Estate, New
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. Taxmann Allied Service Pvt Ltd., 59/32, New Rohtak Road, New Delhi -
9. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road, Ahmedabad-15
10. LAWCRUX Advisors Pvt Ltd. LAW House.1-8.Sector - 10. Faridabad 121003 (Harvana)
11. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
12. Office Copy
13. Guard file

3. SH. PALA RAM , AUTHORISED SIGANATORY
M/S BIRD AUDIO ELECTRONICS, KHASRA NO. 61, JHARODA MAJRA BURARI,
DELHI-84

Assistant Registrar
(SM Appeal Branch)

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

E/Appeal Nos.2030-2031/2009-SM

(Arising out of order in appeal No.38-39/CL/DLH/2009 dated 8.4.2009 passed by the Commissioner of Central Excise (Appeals),New Delhi)

Date of Hearing: 31.3.2011

For Approval and signature: Pronounced on : 07-06-11

Hon'ble Mr.Mathew John, Technical Member

1.	Whether Press Reporters may be allowed to see The order for publication as per Rule 27 of the CESTAT(Procedure) Rules, 1982?	Yes
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?	Seen
4.	Whether order is to be circulated to the Department Authorities?	Yes

1.M/s Bird Audio Electronics
2. Pala Ram

Appellants

Vs

CCE, Delhi

Respondent

Appeared for the Appellant: Shri Naveen Mullick, Advocate
Appeared for the Respondent: Shri Anil Khanna, SDR

Coram: **Hon'ble Mr. Mathew John, Member (Technical)**

Final ORDER 302-303/2011 SM(BR)

Per Mathew John:

The First Appellant, M/s Bird Audio Electronics is a manufacturer of loud speakers and degaussing coils falling under Chapter Heading 8518 and 8529 of Central Excise Tariff.

2. The Second Appellant is the authorized signatory of the First Appellant.

3. This case relates to the period 1999-00 to 2002-03. The First Appellant used to buy part of its requirement of raw materials like copper winding wire and PVC coated copper wire from M/s Satvik Industries, C-157, Mayapuri Industrial Area, New Delhi (hereinafter referred to as "SI") and was taking Cenvat credit. Investigation with SI showed that SI was in some cases supplying just invoices without any goods to some of its customers to enable them to take fraudulent Cenvat credit. The matter was investigated with reference to supplies made to the First Appellant and a case of fraudulent credits availed was made against it. A show cause notice was issued and adjudicated which resulted in adverse consequences to the Appellants. Demands for duty were confirmed along with interest payable and penalties were imposed under various sections of the Central Excise Act and Central excise Rules.

4. Aggrieved by this adjudication order, the Appellants filed appeal with Commissioner (Appeal) who rejected the Appeal. Aggrieved by the order of the first appellate authority the Appellants have filed these appeals.

5. The case against the Appellant is built on,-

(i) the statement of Shri Rajesh Jain the proprietor of SI;

(ii) the fact that many of the vehicle numbers shown in the invoices showed numbers of auto-rickshaw, car, scooter etc which could not have carried the goods covered by the invoice;

(iii) the statement of drivers of some of these vehicles.

6. The relied upon documents are the following:

(i) Statement dated 02-04-2004 of Shri Rajesh Jain proprietor of SI;

(ii) Statement dated 18-06-2004 of Shri Pala Ram Sharma the second appellant and authorized signatory of the first appellant;

(iii) Statement dated 18-10-2004 of Shri Hari Kishan the owner of vehicle No. DL 1R 0558 (This auto-rickshaw carried 17 impugned consignments);

(iv) Statement dated 08-11-2004 of Shri Raisur Rehman owner of Vehicle No. DL 4S 1476 (This scooter carried one consignment weighing 45.14 Kgs);

(v) Statement dated 27-01-2004 of Shri Nirmal Singh owner and driver of Vehicle DL 1 RF 7042(This auto-rickshaw carried two consignments);

(vi) Statement dated 30-01-2004 of Shri. Rakesh Paswan Driver and brother of the owner of Vehicle No. DL 1 RF 3638 (This auto-rickshaw carried one consignment);

(vii) R. N. Vijan owner of vehicle No. DL 1R 2540 (This auto-rickshaw carried one consignment);

Out of the above, item (ii) is not incriminating the two appellants.

7. There were 74 impugned consignments. Out of these 18 consignments were transported by vehicles owned by Shri Rajesh Jain or his company. That is, vehicle Number DL 9 CB 1541, Maruti Van carried 4 consignments, DL 9CB 0981, Matiz car carried 10 consignments and DL 9CC 8518 , Indica Car, carried 4 consignments.

8. I note that the facts stated in para 4 of the SCN is a distorted translated re-production of the facts stated in the statement dated 2/04/04 given by Shri Jain. The statement is to the effect that he had issued some bills for the purpose of passing on Cenvat credit without actual sales of goods. But he stated that where quantity is in the range of 400-500kgs he had actually sent these goods through the vehicles owned by him or his company. He also stated that where the quantity is more than 500 kgs the goods were not sent through the vehicles. On the other hand para 4 of SCN alleges that Shri Jain stated "that only vehicle numbers were mentioned on the sales invoices without any invoiced material to their buyers and that these vehicles were actually incapable of transporting the goods weighing 500-600kgs". Thus there is a lack of bonafide approach in making the allegation in the SCN.

9. The main submissions of the counsel for the Appellants are the following,-

(i) During the adjudication proceedings the Appellants requested for opportunity to cross-examine Shri Rakesh Jain of SI and the drivers who had given statements against them. Such opportunity was denied to them vide letter dated 04-12-2006 of the adjudicating authority. The reason given is that Shri Rajesh Jain is a beneficiary of the transaction and hence opportunity to cross examine him cannot be given. In the case of vehicle owners/drivers the argument given is that the vehicles were passenger vehicles which could not have carried such goods and there was no need to cross-examine the owners/drivers. Thus the main ground on which the adjudication order and first appellate orders are contested is denial of natural justice by denying cross examination of persons whose statements are relied upon.

(ii) The second ground is that the statement of Mr. Jain does not say that all his invoices were fake but he said that his invoices said to cover more than 500 kgs were fake. It is contested that only very few invoices accounted by the Appellants covered goods weighing more than 500 kgs. In fact only 6 out of 74 impugned consignments weighed more than 500 kgs.

(iii) The third argument given is that during investigation stage the Appellants were not confronted with the evidences appearing against them. A statement was recorded without showing any evidence against them. During the statement the authorized signatory had confirmed that all the goods were received in the factory and payments to the suppliers were made by cheques.

10. The submissions by the DR are,-

(i) Shri. Jain was a beneficiary of the fraud and therefore, his cross examination was not allowed;

(ii) This is a case where auto-rickshaws and scooters were shown to have transported the impugned goods. Since such a possibility does not exist no opportunity was given to cross examine the drivers of the vehicles because producing these persons for cross-examination can be quite a harassment to those persons;

(iii) The type of vehicles said to be used brings out the fraud clearly and so no benefit of doubt should be given to the Appellants.

11. Perused records and considered arguments on both sides.

12. The Ld advocate quoted the decision of Rani Sati Fabric Mills (P) Ltd CCE Mumbai-III (2001 (44) RLT 695-Tri) and that in Shalimar Rubber Industries and Ors Vs. CCE Cochin (2002 (53) RLT 503 SC) to prove his contention that denying cross-examination would strike at the root of the evidence given by the concerned persons. On the other hand the Ld. DR quoted the decision of Kolkata High Court in Fortune Impex Vs. CC Calcutta (2001 (138) ELT 556) and the decision of Tribunal in

Ranjeev Alloys Ltd Vs. CCE Chandigarh (2009 (236) ELT 124) to support his argument that not allowing cross examination of some witnesses cannot be fatal. Actually this is an issue to be decided based on the facts of each case considering the relevant facts stated by the person concerned, the points to be tested in cross examination, other evidences in the case, whether there is undue difficulty in allowing cross-examination, etc. The department may deny cross examination of witnesses at its own peril, quoting decisions in its favour without appreciating the facts and the circumstances in each case.

13. The reason for not allowing the cross examination of Shri. Jain is not acceptable at all. If he was a beneficiary and not likely to depose against the Appellants who were also benefited from the alleged fraud, how did the department get the statement from Mr. Jain which is being relied upon! An argument that at the time of recording the statement he was trustworthy but HE cannot be trusted during cross-examination is inherently contradictory. If from cross examination such a position emerges it is to be explained by the adjudicating authority. Such a presumption without cross-examination is unacceptable. The department's case does not bring out whether any action was taken against Shri Jain for issuing fraudulent invoices. In the absence of this information it has to be presumed that the department took statements against the Appellants from him and allowed him to go scot free without even allowing his cross examination. Even if there is a case separately booked against him the right of the accused to cross examine cannot be denied by the adjudicating authority. The issue will come up only if the co-accused claims his privilege not to give any testimony which may incriminate him. This is not the case here. So the entire statement given by Jain has to be discarded as untested evidence.

14. There is only one consignment which is said to have been transported in a scooter. The weight of this consignment is only 45 KGS

much less than the weight of a pillion rider. Since it is quite common to transport small consignments of goods by scooter, the evidence that the vehicle was a scooter does not add much credence to the case made out, especially in a situation where the cross-examination of the owner of the vehicle was not allowed.

15. Another argument given is that the auto-rickshaws in question were registered for transport of passengers and hence these vehicles could not have carried goods. This argument also is not acceptable when seen in the context of ground realties in this country. Quite often auto-rickshaws are used for transporting goods. Such act may amount to violation of provisions in Motor Vehicles Act and Rules made thereunder. Such offence, if any is to be taken cognizance of by the authorities under the said Act. But a deductive logic used to prove that the impugned goods could not have been transported at all is faulty.

16. This case is based on a statement that most of the invoices issued by SI covering more than 500 Kgs of goods were fraudulent. On the basis of this statement, all credits based on all invoices for any quantity issued by SI were dis-allowed. Thus the case made out is not consistent with the evidence collected.

17. On the whole this case is made out based on inadequate investigation and unacceptable principle followed during adjudication. The only matter that could have survived is the transportation of 6 consignments weighing more than 500Kgs in each case.and one such case being that of a consignment weighing 705 Kgs transported by an auto-rickshaw. In this case there can be a suspicion but once the statement of Shri Jain, itself is discarded the very basis of the charge goes.

18. I have considered whether there is any case to remand the matter for a denovo consideration. I find that this is a matter relating to the

years 1999 to 2002. More than nine years have passed by. The investigation itself was half-hearted with reluctance to examine the detailed data and reluctance to confront the accused with the data to get their explanation. The SCN is issued using distorted version of statements made by the persons concerned. In such circumstances I do not find it proper to remit this matter for denovo consideration.

19. So I allow the Appeal by setting aside the order-in-original and order-in-appeal.

(Pronounced in open Court on 7-6-11)

(Matnew John)
Member (Technical)