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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

Date **30/06/2011**

Appeal No. **E/894 /2009 – SM [BR]**

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

To :
M/S J.C. ROLLING MILL PVT. LTD.
93-A, FACTORY AREA, FAZALGANJ, KANPUR.

M/S J.C. ROLLING MILL PVT. LTD. Appellant
Vs
Respondent
C.C.E. KANPUR

I am directed to transmit herewith a certified copy of **Final order No. 354 / 2011-SM[BR]** dated 15.6.2011 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. KANPUR
117/7, SARVODAYA NAGAR,
KANPUR 208005.

2. Adv. / Consult SHRI SAURAV YADAVA ADV.
A-103, DEFENCE COLONY 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. 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

Assistant Registrar
(SM Appeal Branch)

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI
COURT NO. III

Excise Appeal No. 894 of 2009-SM(BR)

[Arising out of Order-in-Appeal No. 449-450-CE/APPL/KNP/2008 dated 24.12.2008 passed by the Commissioner of Customs & Central Excise (Appeals), Kanpur]

For approval and signature:

Hon'ble Mr. M. Veeraiyan, Member (Technical)

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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 should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not? : Yes
3. Whether Their Lordships wish to see the fair copy of the Order? : Seen
4. Whether Order is to be circulated to the Departmental authorities? : Yes

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M/s. J.C. Rolling Mills Pvt. Ltd. — Appellants

Vs.

Commissioner of Central Excise
Kanpur — Respondent

Appearance:

Shri Saurav Yadava, Advocate for the Appellants
Shri S.K. Bhaskar, DR for the Respondent

Date of Hearing/decision : 15.6.2011

Final

ORAL ORDER NO. 354/2011-SM(BR)

Per M. Veeraiyan:

This is an appeal against the order of the Commissioner (Appeals) No. 449-450-CE/APPL/KNP/2008 dated 24.12.08.

2. Heard both sides extensively.

3. The relevant facts, in brief, are that the officers visited the premises of the appellant's factory on 14.8.07 and conducted verification of stock which revealed the following discrepancies:

S. No.	Description of finished goods	Stock should be as per record (MT) RUD-3	Qty. of goods physically found in the factory (MT)	Difference in stock (MT)	Rate per MT (Rs) RUD-3	Value of short found goods (Rs.)
01	Angle	274.095	253.715	(-)20.380	18500	377030/-
02	Rectangle Bar	171.135	154.700	(-)16.435	17500	287613/-
03	Square Bar	29.240	16.060	(-)13.180	18500	243830/-
04	Round Bar	10.910	1.805	(-) 9.105	18500	168443/-
		Total				1076916/-

4. Shri B.K. Srivastava, authorised signatory in his statement dated 14.8.07 admitted the shortage but expressed his inability to explain the reason for the same. The show cause notice has been issued assuming that the short found goods valued at Rs.10,76,916/- were clandestinely removed and original authority confirmed demand of duty of Rs.1,77,477/- along with interest and imposed equal amount of penalty on the appellants. Commissioner (Appeals) has upheld the order of the original authority in so far as the present appellant is concerned.

5. Learned advocate submits that there was no shortage of the goods as alleged in the show cause notice. The stock taking was done on average method i.e. for example, a few angles were weighed and weight of angle has been arrived at by multiplying the average weight of an angle with the number of angles and such a method is not accurate. He also submits that the personal hearing intimation said to have been sent by the original authority has not been received, and that this plea was taken before the Commissioner (Appeals). But the Commissioner (Appeals) has not dealt with the same. He seeks setting aside the order of the Commissioner (Appeals). Alternatively, he submits that there is no finding of clandestine removal and therefore, no penalty under section 11AC should be sustained.

6. Learned DR reiterates the findings and reasoning of the Commissioner (Appeals).

7. I have carefully considered the submissions from both the sides and perused the records. The shortage of goods in four different categories of finished goods manufactured by them have been reproduced above. In the case of round bar, the shortage is more than 85%. Similarly, in respect of square bar, the shortage is more than 40%. The value of the short found goods is also substantial, being more than Rs.10 lakh. The authorised signatory vide his statement recorded under Section 14 admitted the shortage but strangely expressed his inability to explain the same. It has not been claimed that statement of the authorised signatory accepting the shortage has ever been retracted. It

is noticed that show cause notice was issued on 3.1.08 and the appellants have undisputedly received the same as could be seen from the fact that copy of show cause notice along with enclosures was submitted by them before the Commissioner (Appeals). The original order clearly records that reminders have been issued seeking reply on 27.2.08 and 6.6.08. The adjudication order has been passed on 29.9.08. Undisputedly no valid reason is forthcoming for not filing the reply. It is also recorded in the order in original that personal hearing was granted on seven occasions. The claim that they have not received personal hearing intimation lacks creditability. It is noticed that address given in the show cause notice, order in original, order of the Commissioner (Appeals) and even in the present appeal memorandum are the same. As the appellants have chosen not to file any reply, it is clear that their claim that they have not received intimation for personal hearing is ~~clearly~~ hr doubtful. At any rate, Commissioner (Appeals) have granted personal hearing and gone into the merits of the case. Commissioner (Appeals) has also noted that the overall shortage is more than 10% of the weight of the entries in the record, therefore, the same cannot be treated as nominal or permissible shortage. Since shortage was substantial and no explanation was forthcoming, the appellants have failed to explain the shortage of goods accounted for in the production records, the liability to pay duty cannot be doubted. The interest liability is also to be upheld.

8. However, every case of shortage cannot be presumed to be a case of clandestine removal in the absence of other evidence corroborating the same. The authorised signatory has expressed his inability to explain the shortage. No further investigation appears to have been undertaken by the investigators either from the dealers of the appellants or other concerned parties. Under these circumstances, the question of upholding the charge of clandestine removal, which is a serious charge, does not arise. Clearly charge of improper maintenance of accounts is established. Further, I find that show cause notice has proposed penalty under Rule 25 of the Central Excise Rules, 2002 read with Section 11AC of the Central Excise Act, 1944. In view of the above, the appeal is disposed of as follows:

a) The duty demand along with interest is upheld.

b) Penalty of Rs. 1,77,477/- imposed under Section 11AC is converted into a penalty under Rule 25 and the same is reduced to Rs.50,000/- (Rupees Fifty thousand only).

(M. Veeraiyan)
Member(Technical)

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