(19)

TELEGRAM : CEGCANAL M/S REAL IRON COMPANY PVT. LTD.
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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/3015 – 3016 / 2009 –SM[BR]** Date **07/09/2011**

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 REAL IRON COMPANY PVT. LTD. Respondent

I am directed to transmit herewith a certified copy of **Final order No. 567-568/2011-SM[BR]** dated 18.8.2011 passed by the Tribunal under **Section 35-C(1)of Central Excises Act, 1944**

Assistant Registrar
(SM Appeal Branch)

Copy to :

1. Respondent
1. **M/S REAL IRON COMPANY PVT. LTD.**
2. **M/S REAL IRON COMPANY PVT. LTD.**
B-9, INDUSTRIAL AREA, ORAI.

2. Adv. / Consult SHRI ANIL KUMAR ADV.
113/145, SWAROOP NAGAR, KANPUR

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

Assistant Registrar
(SM Appeal Branch)

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.
Principal Bench, New Delhi

COURT NO. IV
Excise Appeals No. 3015-3016 of 2009 (SM)

[Arising out of the Order-in-Appeal No. 242-243/CE/APPL/KNP/2009 dated 28/08/2009 and 236-237/CE/APPL/KNP/2009 dated 27/08/2009 passed by The Commissioner (Appeals), Central Excise, Kanpur.]

For Approval and signature :
Hon'ble Shri Rakesh Kumar, Member (Technical)

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?	:
3.	Whether their Lordships wish to see the fair copy of the order?	:
4.	Whether order is to be circulated to the Department Authorities?	:

CCE, Kanpur — Appellant

Versus

M/s Real Iron Company Pvt. Ltd. — Respondent

Appearance

Mrs. R.K. Jagdev, Authorized Representative (SDR) – for the appellant.

Shri Anil Kumar Dixit, Advocate – for the respondent.

CORAM : **Hon'ble Shri Rakesh Kumar, Member (Technical)**

DATE OF HEARING : 18/08/2011.

Final Order No. 567-568/2011 SM (BR) Dated :

Per. Rakesh Kumar :-

The respondents are manufacturers of MS Ingots chargeable to Central Excise Duty. They avail Cenvat credit of Central Excise duty paid on inputs and capital goods used in or in relation to the manufacture of finished products. On 15/2/08 and subsequently on 28/8/2009, respondent's factory was visited by surprise by the Jurisdictional Central Excise officers. On first occasion, shortage of 24.140 M.T. of MS Ingots involving duty of Rs. 79,566/- was detected and on second occasion shortage of 29.435 M.T of M.S. Ingots and 8.5 M.T. of sponge iron (input) involving duty/Cenvat credit duty of Rs. 1,25,867/- was detected. On each occasions, either Director or Authorized Signatory of the respondent company was present and he accepted the shortage and on being asked about the reasons for the same, they, in their statement recorded under Section 14 of the Central Excise Act, 1944 stated that shortage may be clearance of goods found short by their workers without their knowledge and without issue of invoice. On both the occasions the duty/Cenvat credit involved on the finished goods/inputs found short, was paid even before the issue of show cause notice. Subsequently, after issue of show cause notices the Jurisdictional Assistant Commissioner confirmed the duty/Cenvat credit demands and imposed penalties of equal amount on the respondent under Section 11AC. In the second case, arising out of the visit of 24/9/08, in addition to penalty to the respondent company penalty of Rs. 2,000/- was imposed on Shri Harsh Purwar, Authorized Signatory. On appeal being filed by the respondent before the Commissioner (Appeals) against the Assistant Commissioner's order, the Commissioner (Appeals) by the impugned orders-in-appeal while upholding the duty/Cenvat credit demand, set aside the penalty on the respondent company and Shri Harsh Purwar on the ground that just on account of shortage, it cannot be concluded that the goods found short had been cleared clandestinely, that clandestine removal is a serious charge, which is required to be proved by the department by the production of cogent evidence and the evidence produced by the department is not sufficient to prove the allegation of clandestine removal. Against the orders of the Commissioner (Appeals) setting aside the penalty on the respondent company under Section 11AC, the Department has files these appeals.

2. Heard both the sides.

2.1 Mrs. R.K. Jagdev, the learned Senior Departmental Representative, pleaded that during the period of one year, the respondents factory was visited twice and on each occasion huge shortage of finished goods/Cenvat credit availed inputs were detected, which have not been disputed by the respondent, that on each occasion, the partner/authorized signatory of the respondent had given statement that the shortage was due to removal of the goods by their employees without their knowledge without issue of invoice, that these statements have not been retracted by them, that it is inconceivable that the employees of the factory would remove finished goods/in such huge quantity and the management would not aware of the same, that looking to the volume of the shortage for which no satisfactory explanations has been given it is clear, that the goods found short had been removed clandestinely that in this regard she relies upon the judgment of Hon'ble Madras High Court in the case of **Alagappa Cements Pvt. Ltd. vs. CEGAT, Chennai** reported in **2010 (260) E.L.T. 511 (Mad.)** wherein Hon'ble High Court has held that when huge shortage of finished goods are detected in a factory, onus is on the assessee to explain the same and in absence of any satisfactory explanation, it would be held that the goods found short have been clandestinely removed, that even if the respondent's explanation that their employees had removed the goods found short without their knowledge is accepted, the respondent would still be liable for penalty as Hon'ble Supreme Court in the case of **Sitaram Dalal vs. Santhanu Prasad Jain** reported in **AIR 66 S.C. (1697)**, has held that it is settled law that master is vicariously liable for the acts of his servant acting in the course of his employment, that Commissioner (Appeals)'s observation that the evidence on record is not sufficient to upheld the allegation of clandestine removal is not correct, as on each occasion, the shortage detected was huge for which no satisfactory explanation has been given, that finding of the Commissioner of Central Excise (Appeals) and contrary to the above-mentioned judgments of Hon'ble Supreme Court and Hon'ble Madras High Court and that in view of this, the impugned order setting aside the penalty on the respondent under Section 11AC is not correct.

2.2 Shri Anil Kumar Dixit, Advocate, the learned Counsel for the appellant, defended the impugned orders-in-appeal by reiterating the findings of the Commissioner (Appeals) in it and pleaded that just because of the shortage of finished goods or Cenvat credit availed inputs, it cannot be presumed that the goods found short had been cleared clandestinely without payment of duty, that in any case, even if the allegation of clandestine removal is upheld and penalty is imposed under Section 11AC, since in each case the entire duty/Cenvat credit had been paid before the issue of show cause notice and no option to pay reduced penalty under proviso to Section 11AC has been given in the orders-in-original, the judgment of Hon'ble Delhi High Court in the case of **K.P. Pouches (P) Ltd. vs. Union of India** reported in **2008 (228) E.L.T. 31 (Del.)** would apply and penalty imposable would be only 25% of the duty/Cenvat credit demand confirmed.

3. I have carefully considered the submissions from the both the sides and perused the records.

4. In this case, during the year 2008, the respondent's factory was visited twice by the Jurisdictional Central Excise officers and on each occasion huge shortage of either finished product – MS Ingots or MS Channels or of Cenvat credit availed inputs was detected. On each occasion, the respondent not only accepted the shortage but also said that the same may be on account of removal of the goods found short by their employees without their knowledge and without issue of invoices. When the shortage is huge, the explanation given by the respondent is difficult to believe, more so, in the background of the fact, that the goods being manufactured by the respondent, are evasion prone where evasion of duty either by clandestine removal or by availing wrong Cenvat credit on the basis of input invoices without actually receiving any goods, is common. In case of clandestine removal of finished goods, there would be shortage of finished goods in

stock taking and in case of availing Cenvat credit on the basis of bogus invoices without actually receiving any inputs, there would be shortage of Cenvat credit availed inputs during stock taking. In the background of this, the explanation given by the respondent for the shortage of Cenvat credit availed is difficult to believe. As held by the Hon'ble Madras High Court in the case of **Alagappa Cements Pvt. Ltd. vs. CEGAT, Chennai** (supra), in the case of huge shortage of finished goods onus is on the assessee to explain the same failing which it can be presumed the goods found short had been cleared clandestinely. In my view, the ratio of this judgment is squarely applicable to the facts of this case. The Commissioner (Appeals)'s finding that the elements for imposing penalty under Section 11AC do not exist in this case is, therefore, incorrect and the same is liable to be set aside. However, since in each of these two cases, the entire amount of duty/Cenvat Credit had been paid before the issue of show cause notice and still in the adjudication order, the option to pay reduced penalty under first and second proviso to Section 11AC by paying the reduced penalty within the period of 30 days from the date of communication of adjudication order had not given, in view of the judgment of Hon'ble Delhi High Court in the case of **K.P. Pouches vs. CCE** (supra), the benefit of Section 11AC cannot be denied.

5. In view of the above discussion, the Commissioner (Appeals)'s orders setting aside the penalty under Section 11AC on the respondent are set aside and in this regard the orders-in-original passed by the original Adjudicating Authority are restored. However, in each case, the penalty under Section 11AC is reduced to 25% of the duty demand under first and second proviso to Section 11AC, which must be paid by the respondent forthwith. Revenue's appeals are allowed.

(Dictated and pronounced in open court.)

(Rakesh Kumar)
Member (Technical)

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