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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/3916/2010 – SM[BR] **Date 29/11/2011**

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

To :
M/S BALKRISHNA INDUSTRIES LIMITED.,
SP-923, PHASE-III, RIICO INDUSTRIAL AREA,
BIWADI, DISTT. ALWAR (RAJ.)
M/S BALKRISHNA INDUSTRIES LIMITED., Appellant
Vs
C.C.E. JAIPUR I Respondent

I am directed to transmit herewith a certified copy of **Final order No. 835 / 2011-SM[BR]** dated 18.11.2011 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. JAIPUR I
N.C.R.BUILDING, STATUE
CIRCLE, "C" SCHEME, JAIPUR
302005.

2. Adv. / Consult
MR.PDS LEGAL, ADVOCAT (M)
20TH FLOOR, EXPRESS TOWER, NARIMAN POINT, MUMBAI-400021

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 Copv
13. Guard file

Assistant Registrar
(SM Appeal Branch)

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No.2, R. K. Puram, New Delhi.

Date of hearing: 13.10.2011
Date of decision: 18/11/2011

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.	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?	—
4	Whether Order is to be circulated to the Departmental authorities?	Yes

Excise Appeal No.3916 of 2010-SM

[Arising out of Order-in-Original No.41/2010(C.E.) dated 20.10.2010 passed by the Commissioner of Central Excise, Jaipur-I].

M/s. Balkrishna Industries Ltd. — Appellant

Vs.

CCE, Jaipur-I — Respondent

Appearance: Rep. by Shri Prakash Shah, Advocate for the appellants.
Rep. by Shri Fateh Singh, DR for the respondent.

Coram: Hon'ble Sh. Rakesh Kumar, Member (Technical)

final Order No. 835/2011 SM (Br) Dated: 18/11/2011

Per: Shri Rakesh Kumar:

The appellants are manufacturers of Automobile tyres of rubber chargeable to central excise duty under sub-heading No.4011 of the Central Excise Tariff. Their first plant for manufacture of tyre was started at Bhiwadi in the year 2002 and subsequently, their second plant was started at RICO Industrial Area, Chopanki, Alwar. In July, 2005, the appellant applied to the jurisdictional Central Excise Commissioner for outside storage of the finished goods manufactured by them under Rule 4 (4) of the Central Excise Rules, 1944 on the following grounds -

(a) While the initial production capacity of their plant at Bhiwadi was 25 MT/ per day, the same has increased to 100 MT/per day and and substantial extension required addition of not only the manufacturing facilities like machines for tyre manufacture and tyre curing machines but the related utilities also viz. Boilers, Compressors, Power Generating Sets, Tool Room, Testing Facilities, etc. and which have occupied almost the entire space available in the factory premises, leaving a small storage space for final tyres;

(b) They manufactured 900 to 1000 different types of Specialist Tyres. Most of the clients place export orders for bulk quantities with phased/piecemeal delivery schedule every month and this requires them to have sufficiently large production run for each type of tyre and hold inventory of such tyres over a period of time for honouring the phased export shipments.

(a) Their main production is of agricultural tyres, whose demand is seasonal in nature and hence for this reason also, they have to manufacture such agricultural tyres in sizable quantities and store for smooth supplies during off-season also.

(b) The existing storage space adjacent to their factory loading ramp and part of the mezzanine floor is sufficient just for the storage of 4 to 5 days' production i.e. 450-500 tones and unless this space is cleared on day-to-day basis, they are left with no alternative but to curtail the production.

(c) They have tied up with two major international business houses having marketing outlets all over the world for the supply of various types of automobile tyres manufactured by them. The supplies are scheduled to commence two months hence, i.e. Mid September, 2005 and are expected to continue for three years.

These organizations have specifically and categorically put a pre-condition of maintaining adequate inventory of all sizes and types of tyres so that export shipment can be made at a short notice.

On the above ground, the appellant claimed that while they are required to maintain huge inventory of tyres for ensuring uninterrupted supplies/shipments and since there is no space in their factory, they require a place for outside storage under Rule 4(4) of the Central Excise Rules, 2002.

1.1 The Jurisdictional Commissioner granted this permission for a period of one year subject to the following conditions:-

(a) The appellant have to execute a bond for an amount of Rs.4,60,00,000/- backed by bank guarantee of 25% of the bond amount.

(b) The appellant must undertake to pay duty on the goods damaged or lost in transit or during the storage.

(c) The appellant must arrange for the insurance of the duty amount payable to the Commissioner of Central Excise in the event of loss due to any reason.

(d) Storage space/premises is safe and secure and for this purpose, Security & cameras must be provided.

(e) The appellant must maintain two stock registers (RG-I), one at the factory and another at storage place.

(f) Movement of goods from the factory to storage place is made under the prescribed challans which are pre-authenticated by the authorized signatory before bringing into use.

(g) Serial numbers of challan must be intimated to the jurisdictional Dy. Commissioner and Assistant Commissioner and Range Superintendent in advance.

1.2 There is no dispute that the conditions and safeguards prescribed by the Commissioner for outside storage are followed by the appellant. Subsequently, the appellant applied for extension of this facility from time to time, which was granted till September, 2010. In the meantime, the appellant's second plant at Chopanki also started production and similar permission for outside storage at the same premises was granted in respect of the tyres manufactured in Chopanki Plant also.

1.3 In August, 2010, the appellant again requested the Commissioner for extension of the facility of outside storage under Rule 4(4) of the Central Excise Rules mainly on the grounds mentioned above, emphasizing that over

90% of their production is exported and the outside storage facility is used mainly in respect of the clearances for export and that on account of expansion of production capacity every year at both the Plants, they do not have the adequate storage facility at their factory premises. The Commissioner, however, issued a show cause notice dated 25.08.2010 to the appellant proposing for withdrawal of the permission on the ground that they had been enjoying this facility for the last 5 years continuously without making efforts to create storage facility in their factory as required by the law and that the permission under Rule 4(4) of the Central Excise Rules, 2004 can be granted only in exceptional circumstances and the said exceptional circumstances cannot be sort of perpetual and cannot be allowed to continue beyond a reasonable period.

1.4 The above show cause notice was adjudicated by the Commissioner vide Order-in-Original dated 21.10.10 by which –

(a) the permission for outside storage under Rule 4(4) of the Central Excise Rules, 2002 was withdrawn w.e.f. 1.3.2011 and the appellant were asked to make the arrangement for storage of the goods within the factory by that time; and

(b) during the period till 28.02.11 in respect of domestic clearances from the outside storage place, interest would be chargeable from the appellant at the applicable rate for delay in payment of duty for the period from the date of removal from the factory to the date of clearances from the outside storage facility.

1.5 Against this order of the Commissioner, this appeal has been filed.

2. Heard both the sides.

3. Shri Prakash Shah, Advocate, ld. Counsel for the appellant, pleaded that the permission for outside storage under Rule 4(4) has been denied by the Commission mainly on the two grounds that exceptional circumstances referred to in Rule 4(4) cannot become sort of perpetual and cannot allowed to be continue beyond a reasonable period and the facility is being enjoyed by the appellant continuously for five years and its further expansion would amount to permitting warehousing under Rule 20 of the Central Excise Rules, 2002 for which neither the appellant have applied nor any permission has been given, that the Commissioner's interpretation of the word 'exceptional circumstance' in Rule 4(4) is not correct, that in terms of the provisions of Rule 4(4), 'exceptional circumstance' have to be determined with reference to nature of the goods and shortage of space for storage of goods at the premises of the manufacturer, that so long as exceptional circumstances on account of nature of the goods or shortage of

the storage space at the factory where the goods are manufactured continue, this permission has to be granted, that as is clear from the figures of the production given in the appeal memo, while in Bhiwadi Plant the production has increased from 14526 M.T. in 2003-04 to 32036 in 2009-10, in Chopanki Plant, the production has increased from 1659 M.T. in 2006-2007 to 28177 M.T. in 2009-10, that enhancement of the production capacity results in more space being occupied by the production machinery and other ancillary facilities, leaving less space for storage, that in addition to this, on account of nature of demand for their product and also export commitments, the Appellant are required to store huge quantity of tyres for which they do not have the storage facility at their plant, that on account of shortage of space to store the tyres, which they are required to store to meet their export commitments, the 'exceptional circumstance' necessitating outside storage of goods have continued, that for this reason, the Commissioner's order denying this facility is incorrect, that outside storage under Rule 4(4) cannot be compared with warehousing under Rule 20 of the Central Excise Rules, 2002, that as mentioned in Board's Circular No.206/40/1996 dated 1.5.96 outside storage .is an extension of the factory premises , that in terms of the this Circular of the Board, the permission for outside storage of cenvat credit availed goods, which due to various reasons cannot be stored in the factory, must be granted by treating the outside storage as extension of the factory premises and prescribing the suitable safeguards to protect the interests of the Revenue, that the Tribunal in the case of **Anutone Accoustics Ltd. reported in 2010 (250) ELT 590 (Tribunal-Bang.)** has held that while according the facility of outside storage of the factory under Rule 4(4), the Commissioner should consider the compelling circumstances necessitating outside storage, that the appellant have always complied with all the conditions prescribed by the Commissioner for safeguarding the interests of the Revenue in respect of the goods allowed to be stored outside the factory premises and there is no allegation of the Department that the conditions prescribed by the Commissioner have been contravened, that when the appellant are prepared to comply with all the conditions prescribed by the Commissioner for safeguarding the Revenue's interest in respect of the goods allowed to be stored outside the factory premises and when the circumstances compelling the appellant to store the goods outside the factory premises still continue, it is not correct for the Commissioner to withdraw this permission and that in view of this, the impugned order is not correct.

4. Shri Fateh Singh, the ld. Departmental Representative, supported the impugned order by reiterating the findings of the Commissioner in it and

emphasized that Rule 4(4) provides for storage of the goods outside the factory premises only in exceptional circumstances and such exceptional circumstances cannot continue for years, that the appellant have not made sincere efforts to arrange for storage of the good within the factory premises, that the facility outside storage being enjoyed by the appellant for the last 5 years amounts to permitting warehousing facility under Rule 20 without the place being notified as warehousing station and without the permission in this regard having been granted, that even if the permission for outside storage is used by the appellant mainly in respect of the clearances for export, it amounts to enjoying warehousing facility under Rule 20 without any permission and without following the prescribed procedure in this regard in the Board's Circular No.581/18/01/CX/09 dated 29.06.2001 issued under Rule 20 (1) of the Central Excise Rules, 2001, that in respect of the goods cleared from outside storage premises for home consumption, the department loses the interest which would be chargeable if the outside storage was under the warehousing provisions of Rule 20 and that in view of this, there is no infirmity in the impugned order.

5. I have carefully considered the submissions from both the sides and perused the records. The goods produced and manufactured in a factory can be kept within the factory without payment of duty, as in terms of the

provisions of Rule 4(1) of Central Excise Rules, 2002, the duty becomes payable only at the time of removal of the goods from the factory. This rule, however, also provides that the goods can be removed from the factory without payment of duty to a warehouse under Rule 20 of the Central Excise Rules and that in that case the duty would be payable at the time of removal of the goods from the bonded ware house. However, sub-rule (4) of Rule 4 prescribes that the Commissioner in exceptional circumstances having regard to the nature of the goods and shortage of storage at the premises of the manufacture where the goods are made, permit a manufacturer to store his goods at any other place outside the factory premises without payment of duty, subject to such conditions as he may specify. In this regard, sub-rule (4) is reproduced below:-

> **"Rule 4(4)-Notwithstanding anything contained in sub-rule (1), Commissioner may, in exceptional circumstance having regard to the nature of the goods and shortage of storage space at the premises of the manufacturer where the goods are made, permit a manufacturer to store his goods in any other place outside such premises, without payment of duty subject to such conditions as he may specify".**

Thus the words **"exceptional circumstances"** cannot be read in isolation but have to be read with the expression **"having regard to the nature of the**

goods and shortage of storage space at the premises of manufacturer where the goods are made. The examples of such **"exceptional circumstances"** can be the goods manufactured being of hazardous nature or there is seasonal production of such volume, which can not be stored in the factory or due to some commitment for sale, domestic or for export, which have to be made during ~~the~~ some period, huge quantity has to be manufactured and stored so that the assessee is able to supply the goods as soon as the orders are received. The Commissioner's interpretation of sub-rule 4(4) that the "exceptional circumstances" can not continue in perpetuity is not correct, as he has read this expression in isolation and if the "exceptional circumstances" caused by the nature of the goods or shortage of storage space continue, the permission for outside storage under this sub-rule has to be granted subject to the conditions for safeguarding the interest of Revenue. The appellant in their letter dated 7.8.2010 have mentioned a number of circumstances which compel them to store the goods outside the factory premises. In my view, if these circumstances still exist as a result of which the Appellant have no option but to store the goods outside the factory premises, the permission for outside storage has to be granted subject to the conditions as are necessary for safeguarding the interest of the Revenue. The permission under sub-rule cannot be refused just because an assessee has been enjoying the same continuously for certain number of years.

5. The Revenue's plea is that such outside storage facility under sub-rule (4) ~~for~~ of Rule 4 continuously for several years amounts to enjoying the warehousing facility under Rule 20 of the Central Excise Rules. However, I find that this ground has not been taken in the show cause notice, as the show cause notice has been issue on the basis that the permission under Rule 4(4) can be granted only under the "exceptional circumstances" and the said circumstances can not be sort of perpetual and cannot continue beyond reasonable period. In view of this, at the adjudication stage, the Commissioner can not travel beyond the show cause notice and invoke Rule 20 of the Central Excise Rules, 2002 for denying the permission. Moreover outside storage under Rule 4(4) under the circumstance of exceptional nature having regard to the nature of the goods and shortage of storage space in the factory, is different from the warehousing facility under Rule 20. The outside storage place under sub-Rule (4) of Rule 4, as clarified in the Board's Circular dated 1.5.96, is an extension of the factory premises while the bonded warehousing under Rule 20 is not an extension of factory premises and for that purpose, separate registration has to be obtained. The Revenue's plea that outside storage of non-duty paid goods under Rule 4(4) means

deferment in duty collection for which there is no provision under Central Excise Law except under the warehousing provisions of Rule 20, is also not correct, as the outside storage premises under sub-rule (4) of Rule 4, is an extension of the factory and within the factory the goods can be kept without payment of duty and as such, there is no time limit prescribed in this regard – the duty becomes payable only at the time of removal of the goods. Therefore, the Revenue's plea that there is deferment of collection of duty in cases of outside storage of the goods under Rule 4(4) without payment of duty is not correct.

6. On going through the impugned order, I find that nowhere in the order, the reasons given by the appellant in their letter dated 7.8.2010 compelling them to store the tyres outside the factory have been discussed. The permission for storage outside the factory premises has been denied ~~mainly~~ only on the ground that this permission can be granted only under "exceptional circumstances" and such "exceptional circumstances" can not be sort of perpetual and cannot continue beyond a reasonable period and the same amounts to enjoying warehousing facility under Rule 20 for which no permission has been granted. As discussed above, the ground on which this permission has been denied are not correct. So long as the "exceptional circumstances" caused on account of nature of the goods or shortage of

storage space continue, the permission under rule 4(4) has to be given for onside storage of the goods without payment of duty after prescribing the conditions as are necessary for safeguarding the interest of the revenue. In view of this, the impugned order is set aside and the matter is remanded back to the Commissioner for de novo decision after ascertaining as to whether the circumstances necessitating outside storage, as given in the Appellants letter dated 7.8.2010, still exist or not and if these circumstances still exist, the permission under Rule 4(4) will have to be granted after prescribing the conditions as are necessary for safeguarding the interests of the Revenue. The appeal stands disposed of as above.

[order pronounced in the open court on....18/11/2011]

(Rakesh Kumar)
Member (Technical)

Ckp.