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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/333 /2009 – SM[BR] E / MISC / 40 /2011-SM[BR]** Date **28/12/2011**

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

To :
C.C.E. RAIPUR
CENTRAL EXCISE BUILDING, DHAMTARI ROAD,
TIKRAPARA, RAIPUR 492001.
C.C.E. RAIPUR Appellant

Vs

M/S KWALITY FOUNDRY INDUSTRIES, Respondent

I am directed to transmit herewith a certified copy of **Final order No.941/2011-SM[BR]&M/220/2011** dated 20.12.2011 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 KWALITY FOUNDRY INDUSTRIES,
AMASEONI INDUSTRIAL AREA,
RAIPUR (C.G.)

2. Adv. / Consult SHRI L.P. ASTHANA ADV.
R-163, SECOND FLOOR, GREATER KAILASH
PART-1, NEW DELHI-48.

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 (Haryana)
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)

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
WEST BLOCK NO.II, R.K. PURAM, NEW DELHI-110066

<u>COURT NO. II</u>

<u>E/Misc./40 of 2011 in & Central Excise appeal No. 333/2009-SM</u>

[Arising out of Order-in-Appeal No. 79/RPR-I/2008 dated 18.7.2008 passed by the Commissioner (Appeals-I), Central Excise, Raipur].

Date of Hearing/decision: 20th December, 2011

For approval and signature:

Hon'ble Shri D.N. Panda, Judicial Member

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 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?	

M/s. Kwality Foundry Industries — Appellant

Vs.

CCE, Raipur — Respondent

Present for the Appellant : Shri L.P. Asthana, Adv.
Present for the Respondent : Shri S.K. Bhopra, Advocate

Coram: Hon'ble Shri D.N. Panda, Judicial Member

<u>FINAL ORDER NO.</u> 941/2011 SM (BR) & M-220/2011 SM (BR)

<u>Per D.N. Panda</u>:

In the application it is stated that the amount directed by the order dated 23.10.2009 was deposited before passing of the order. Although that being done on 26.8.2008, for no instruction with the appearing counsel, Tribunal passed its order dated 23.10.2009. Consequently, further deposit was unwarranted. This averment appears to be correct when verification of the application is done by the Counsel on behalf of the appellant. But the verification is undated. However, taking that into view, Misc. application stands disposed without further direction.

2. The matter has been listed today under the category of short matter. To reduce pendency, but not at the cost of justice, the appeal itself is taken for hearing. When the excess and shortage of goods were found the appellant faced adjudication. The excess found goods was accounted for as has been recorded in Para 9 of the adjudication order. The shortage that was found was without proper inventory being taken which is apparent from Para 6 of the first appellate order. Learned appellate authority below being satisfied that the excess goods were accounted set aside the confiscation and redemption fine. He did not consider proper to levy penalty under Section 11AC of Central Excise Act, 1944. He also set aside the penalty under Rule 25 of Central Excise Rules, 2002. It appears that to deter recurrence of offence the authority considered it proper to impose penalty of Rs. 50,000/- under Rule 10 of Central Excise Rules, 2002.

3. The respondent is not in appeal. Revenue is aggrieved by first appellate order. Principal grievance of the Revenue is

that confiscation was warranted. So also it is grievance of the Revenue that penalties imposed under Section 11AC and Rule 25 was justified.

4. Learned D.R. support the decision of the Review Committee and prays for restoration of adjudication order.

5. Learned Counsel for Respondent supports order of learned Commissioner (Apppeals).

6. Heard both sides and perused the record.

7. Reading of Rule 25 Central Excise Rules, 2002 throws light that the said rule is subjected to provision of Section 11AC of Central Excise Act, 1944. Reference to Section 11AC presupposes that intention of evasion should be patent as is embodied in the said rule. That not being found in the case in crystal terms, the appellate authority considered that confiscation was unwarranted. Today there is no evidence led by Revenue to show that modus operandi of the respondent was to cause evasion. Accordingly, there is no scope to interfere with the first appellate order on this count.

8. So far as shortage of stock is concerned the authority has found that there was no cogent evidence before him to appreciate that the shortage has been rightly worked out mathematically. Estimation is not substitute to the mathematical precision when method of inventory taken is challengeable. Appellate Authority has brought out such aspect in Para 6 of the order. In para 9 of the order when the authority found no ill intent of the appellant he appreciated

recording of the excess stock to suffer duty in future. There was no circumstantial evidence to appreciate imposition of penalty along with confiscation. There is no material patent to appreciate the adjudication order levying penalty.

9. When the appellate authority found. that there was controversy and Rule 10 deals with un-accountal of the stock on daily basis he levied penalty of Rs. 50,000/-. The cumulative effect of the shortage and excess stock is quite possible to flow from unaccountal of stock on daily basis. Therefore, appellate authority went to the root of the matter to penalize to the extent of Rs. 50,000/-. That appears to be proper and that is confirmed.

10. For the reasons aforesaid, Revenue's appeal is dismissed.

(Dictated & pronounced in the Open Court.)

(D.N. PANDA)
JUDICIAL MEMBER

RK