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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/1104/2008 – SM[BR] Date 16/03/2010

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 K.S.TECHNOSAFE PVT LTD Respondent

I am directed to transmit herewith a certified copy of **Final order No.** 325 / 2010 –SM[BR] dated 10.3.2010 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 K.S.TECHNOSAFE PVT LTD
   D-4/B,INDUSTRIAL AREA,PANKI SITE-I,KANPUR
2. Adv. / Consult SHRI A.K. DIXTI ADV.
   113/145, SWAROOP NAGAR, KANPUR[U.P.]

3 S.D.R
4 ~~J.C.D.R.~~
5 Bar association, CESTAT, New Delhi
6 Director Publications, Customs, Excise. I.P. Estate, New Delhi
7 M/s Centax Publictions Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi - 3
8 Commercial Laws of India Pvt Ltd. Post Bag No. 1033, No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
9 Raghuraman's 44-B, Regal Flat,Shipra Suncity, Indirapuram - 201010,Ghaziabad, DT, U.P.
10 M/s Manupatra Information Solutions Pvt Ltd. Excise & Customs Cases B-37, Sector - 1, Noida - 201301, Gautam Budh Nagar, (UP)
11 M/s. Deeparchie Publications, M-93, Marg. 46, Saket, New Delhi 110017
12 Taxindiaonline.com Pvt.Ltd. B-XI/8183,Vasant Kunj, New Delhi - 110070
13 Taxmann Allied Service Pvt Ltd., 21/35, West Punjabi Bagh, New Delhi - 110026
14 Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road,Ahmedabad-15
15 LAWCRUX Advisors Pvt Ltd, LAW House,1-8,Sector - 10, Faridabad 121003 (Haryana)
16 Office Copy
17 Guard file

Assistant Registrar
(SM Appeal Branch)

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

WEST BLOCK NO.II, R.K. PURAM,
NEW DELHI-110066.

BENCH-SM

Date of Hearing/Decision:10.03.2010

Excise Appeal No. E/1104/08-SM

[Arising out of Order-in-Appeal No.82-CE/APPL/KNP/2008 dated 28.02.2008 passed by the Commissioner (Appeals), Customs and Central Excise, Kanpur].

For approval and signature:

Hon'ble Mr.S.K. Gaule, 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 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?	

C.C. & C.E., Kanpur Appellant

Vs.

M/s. K.S. Technosafe Pvt. Ltd. Respondent

Present for the Appellant : Shri.S.K. Bhaskar, SDR
Present for the Respondent: Shri.A.K. Dixit, Advocate

Coram: Hon'ble Mr. S.K.Gaule, Member (Technical)

Final **ORDER NO.** 325 / 2010 SM (BR) **DATED: 10.03.2010**

PER: S.K. Gaule

Heard both sides. Revenue is in appeal against the Commissioner (Appeals)'s Order, whereby Commissioner (Appeals) has not imposed penalty and upheld the impugned O-in-O to that extent, on the ground that no corroborative evidence have been found by the Departmental officers from the parties to establish that the shortage of goods was on account of definite clandestine removal. Therefore, clandestine removal of the goods is not established in this case.

2. The contention of the appellant is that there was intention to evade payment of duty and the shortage was detected by the Revenue. Therefore, penalty under Rule 25 of Central Excise Rules, 2002 and Rule 15 of Cenvat Credit Rules, 2004 read with section 11AC is imposable. They also placed reliance on High Court decision in the case of CCE & C, Aurangabad vs. Bageshwari Sahakari Sakhar Karkhana Ltd. reported in 2008 (222) ELT 204 (Bom.)

3. The contention of the respondent is that there is no evidence regarding the clandestine removal of the goods. They also placed reliance on Tribunal decision in the case of Commissioner of Central Excise, Kanpur vs. Quality Steel Products Ltd. reported in 2009 (239) ELT 30 (Tri.- Del.).

4. I find that ld. Commissioner (Appeals) in the impugned order has found as under:-

"Coming to the cases where shortage has been detected in the stocks at the time of stock verification in the factory, it has generally been observed that the person in-charge on the spot admits the shortage and pays up the duty. Very rarely, subsequent investigation brings out corroborative evidences to conclude that the shortage found was on account of definite clandestine removal. While dealing with such a case, the Punjab & Haryana High Court in the case of M/s. Sigma Steel Tubes [2007 (218) ElT 657 (P & H), while following the apex court judgement in Rashtriya Ispat Nigam Ltd. Has also observed that in absence of any corroborative evidence in cases of shortages in the stocks of goods found in a factory, it is not clear whether the same was on account of clandestine removal or on account of wrong accounting or the clerical mistake etc. Hence, no penalty is imposable, once a duty has been paid before the issue of show cause notice.

Under the circumstances, I am of the opinion that the present case of shortages in the stock of raw materials uncorroborated with any evidence of clandestine removal is fully covered by the aforesaid binding pronouncements delivered by the higher Courts."

The ld. Commissioner (Appeals) has not imposed penalty on the ground that no corroborative evidence have been found by the Departmental officers from the parties to establish that the shortage of goods was on account of definite clandestine removal. The appellant could not produce any evidence contrary to the findings of the Commissioner (Appeals). The Hon'ble Bombay High Court decision in the case CCE & C, Aurangabad vs. Bageshwari Sahakari Sakhar Karkhana Ltd. (supra) relates to discretion to levy less penalty or exempt penalty under section 11 AC whereas the instant case relates where no evidence has been brought out regarding clandestine removal. In these circumstances and in view of the Tribunal's decision in the case of Commissioner of Central Excise, Kanpur vs. Quality Steel Product Ltd. (supra) I do not find any infirmity in the concurrent findings of the lower authorities. The appeal is dismissed.

[Dictated & Pronounced in the open Court].

(S.K. GAULE)
MEMBER (TECHNICAL)

RK