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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/1133/2008 – SM[BR] Date 18/03/2010

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 PARAGON INDUSTRIES Respondent

I am directed to transmit herewith a certified copy of **Final order No**. 339 / 2010 –SM[BR] Dated 11.3.2010 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 PARAGON INDUSTRIES
   D-7, FOUNDRY NAGAR,AGRA.
2. Adv. / Consult SHRI K.K. ANAND ADV.
   A-5, BASMENT LAJPAT NAGAR-III NEW DELHI
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)

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

BENCH-SM

**Date of Hearing/Decision:11.03.2010**

Excise Appeal No.E/1133/08-SM

[Arising out of Order-in-Appeal No.81/CE/APPL/KNP/2008 dated 10.03.2008 passed by the Commissioner (Appeals), 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? | |

Commissioner, Customs & Central Excise, Kanpur ...Appellant

Vs.

M/s. Paragon Industries, Agra ... Respondent

Present for the Appellant :Shri. S. Gautam, SDR
Present for the Respondent:Ms. Asmita Nayak Advocate

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

Final **ORDER NO.** 339/2010 SM (BR) **DATED:11.03.2010**

**PER: S.K. Gaule**

Revenue is in appeal against order in appeal No.81/CE/APPL/KNP/2008 dated 10.03.2008 whereby Commissioner (Appeals) has set aside the imposition of penalty on the respondent.

2. The contention of the appellant is that the respondent could not explain the shortage of stock. This clearly shows mens-rea on the part of the respondents. They also placed reliance in the case of Jag Prakash Synthetics vs. Commissioner of Cust. & C. Ex., Surat reported in 2003 (156) E.L.T. 805 (Tri.-Mumbai) and Commissioner of Central Excise, Indore, vs. Deepak Spinners Ltd. reported in 2005 (179) ELT 93 (Tri.- Del.).

3. The contention of the respondent is that as soon as the shortages were found they have paid the duty and the interest involved in this case and there is no intention to evade payment and there was no clandestine removal.

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

*"The duty / reversal of Cenvat Credit has not been challenged by the Appellants, however, on penalty issue, the appellants have pleaded the provisions of Section 11AC of the Act as well as provisions of Rule 25 & 26 of Central Excise Rules, 2002 for imposition of penalty are not invokable in view of various pronouncements (referred supra) wherein it has been held that where duty amount is paid by the assessee before issuance of show cause notice, no penalty can be imposed.*

*The issue of imposition of penalty in cases, where duty has been paid by the party before issue of show cause notice, has been agitating the minds both of revenue as well as the Tribunal/Courts for quite some time. There have been plethora* *of judgements, which say that once duty has been paid before issue of show cause notice, no penalty is imposable. Also there are judgements stating that once Section 11AC is applicable, there is no scope of reducing the penalty and mandatory penalty must always be imposed. Inv iew of these judgements, the main question that crops up is whether Section 11AC is applicable in a given cause or not and if applicable, obviously there is no scope to reduce or waive the penalty.*

*While going through the various case laws in this regard, I find that the Hon'ble Supreme Court in the case of Rashtriya Ispat Nigam Ltd. [2004 (163) ELT-A 53 (SC)] has dismissed the departmental appeal against the order of the Tribunal interalia holding that the penalty is not imposable in cases where duty has been paid before the issue of show cause notice. This judgement of the apex court has been subsequently followed by Karnataka High Court in the case of Shree Krishna Pipe Industries [2004 (165) ELT 507 (T)]. In this case, Hon'ble High Court has strictly followed the observations of the Hon'ble Supreme Court in Rashtriya Ispat Nigam Ltd. and has held that where the assessee deposits the duty prior to issue of show cause notice, penalty should not be imposed.*

*In another case of Gaurav Mercantile Ltd. [2005 (190) ELT 11 (Bom.)], a Division Bench of Hon'ble High Court, Mumbai have gone a step ahead and has held that no penalty is imposable even in cases where goodes have been seized in transit and where attempted clandestine removal established; provided that 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 or raw materials uncorroborated with any evidence of clandestine removal is fully covered by the aforesaid binding pronouncements* *delivered by the Higher Courts, and hence, no penalty is imposable le in this case."*

5. The appellant could not produce any evidence contrary to the above. Further the Tribunal decision in the case of Commissioner of Central Excise, Indore vs. Deepak Spinners Ltd. 2005 (179) ELT 93 (Tri. Del.) relied upon by the appellant relates to violation of condition of the exemption notification and Tribunal decision in the case of Jag Praksh Synthetic vs. Commissioner of Customs & Central Excise, Surat 2003 (156) ELT 805 (Tri. Mum.) relied upon by the appellant relates to evasion of duty. These are not relevant to the facts of the present case. 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., I do not find any infirmity with the impugned order in appeal. Appeal is dismissed.

[Dictated & Pronounced in the open Court].

**(S.K. GAULE)**
**MEMBER (TECHNICAL)**

Anita