TELEGRAM : CEGCANAL
Website : www.cestat.gov.in

REGISTERED / AD
Email : delhi@cestat.gov.in

# 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/1105/2008 – 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 ROTOMAC INDUSTRIES PVT LTD Respondent

I am directed to transmit herewith a certified copy of **Final order No**. 340 / 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 ROTOMAC INDUSTRIES PVT LTD
   D-4A,PANKI INDUSTRIAL AREA,SITE-I,KANPUR (U.P.)
2. Adv. / Consult
   NONE;----------------

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/1105/08 -SM

[Arising out of Order-in- appeal No. 84-CE/APPL/KNP/2008 dated 28.02.2008 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. Rotomac Industries Pvt. Ltd., Kanpur ... Respondent

Present for the Appellant :Shri.S.K. Bhaskar, SDR
Present for the Respondent: None

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

Final **ORDER NO.** 340/2010 SM (BR) **DATED:11.03.2010**

**PER: S.K. Gaule**

Revenue is in appeal against order in appeal No. 84-CE/APPL/KNP/2008 dated 28.02.2008 whereby the Commissioner (Appeals) has rejected the appeal of the department regarding imposition of penalty under Rule 15 of

Cenvat Credit Rules 20004 and Rule 25 of central Excise Rules 2002 and Section 11AC of C E A 1944 and upheld the lower adjudicating authority's order to the extent the lower adjudicating authority did not impose any penalty against the respondent.

2. Shri S.K. Bhaskar, ld. SDR appeared for the appellant and the respondent vide their letter dated 26.02.2010 requested to decide the case on merit.

3. The contention of the appellant is that the respondent did not reverse the Cenvat credit taken on the motor which was returned by the respondent at the factory. The contention is that this fact was pointed out by the appellant to the respondent. Thereafter, the respondent had deposited the said amount alongwith interest through TR 6 No.5 dated 01.02.06 alongwith interest by challan No.16 dated 18.05.06. The contention is that the respondent has not paid the Cenvat credit on the amount which clearly shows that there was mens-rea on the part of the party. They also placed reliance on Tribunal decision in the case of Jag Prakash Synthetics vs. Commissioner of Customs & Central Excise, Surat reported in 2003 (156) E.L.T. 805 (Tri.- Mumbai).

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

> *"As the amount of Cenvat Credit has already been reversed by the party alongwith interest, the department has come in appeal against non-imposition of penalty in the case. In this regard, the department*

*has taken a view that the party clearly had violated the various provisions of Central Excise law with an intent to evade payment of duty and the duty along-with interest was paid only after persuasion, and therefore, the view taken by the Adjudicating Authority does not appear to be proper in this regard and penalty should have been imposed on the party; On the contrary, the Adjudicating Authority and the party are of the view that penalty is not imposable in view of the case law quoted by the party.*

*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. In view of these judgements, the main question that crops up is whether Section 11AC is applicable in a given case 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-A53 (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 judgment 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 goods 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 is of technical nature, and no mens-rea is involved to evade payment of duty or any allegation of clandestine removal on the part of the party; as such, the instant case is fully covered by the aforesaid binding pronouncements delivered by the Higher Courts, and accordingly, I hold that no penalty is imposable in this case."*

5. The Commissioner (Appeals) has set aside the imposition of penalty upholding the lower adjudicating authority's order for not imposing penalty on the ground that the present case is of technical nature and no mens-rea is involved to evade payment of duty or any allegation of clandestine removal on the part of the party as such. He also placed reliance on Hon'ble Supreme Court's decision in the case of Rashtriya Ispat Nigam Ltd. reported in 2004 (163) Part 1, Page A-53. I find that Hon'ble Tribunal's decision relied upon by the appellant in the case of Jag Prakash Synthetics relates to the case of evasion of duty. The Tribunal decision in the case of Commissioner of Central Excise, Indore vs. Deepak Spinners Ltd. relates to availment of benefit of notification. These cases are not relevant to the present case. Further the appellant could not produce any evidence regarding intent to

evade payment of duty or any allegation of clandestine removal against the respondent. 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 concurrent findings of the lower authorities. Appeal is dismissed.

[Dictated & Pronounced in the open Court].

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

Anita