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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/1140/2007 – SM[BR] Date 13/05/2010

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 INDO LAHIRI BIO POWER LTD. Respondent

I am directed to transmit herewith a certified copy of **Final order No**. 515 / 2010 –SM[BR] dated 5.5.2010 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 INDO LAHIRI BIO POWER LTD.
   JARAUNDA, RAIPUR (C.G.)
2. Adv. / Consult SHRI BIPIN GARG ADV.
   B-1/1289-A, VASANT KUNJ NEW DELHI-70.

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 Company Law Institute of India Pvt Ltd.,No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
9 M/s. Deeparchie Publications. M-93. Marg. 46. Saket. New Delhi 110017
10 Taxmann Allied Service Pvt Ltd.. 59/32. New Rohtak Road. New Delhi - 110005
11 Easy Service Tax Online Dot Com Pvt.Ltd.407A.Iscon Mall.Above Star India Bazar.Satellite Road.Ahmedabad-15
12 LAWCRUX Advisors Pvt Ltd. LAW House.1-8.Sector - 10. Faridabad 121003 (Haryana)
13 Office Copy
14 Guard file
15 TAXINDIAOLINE. COM PVT. LTD. UNIT NO. 1, 2ND FLOOR,
VASANT ARCADE, NELSON MANDELA ROAD, VASANT KUNJ NEW DELHI-70.

Assistant Registrar
(SM Appeal Branch)

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI PRINCIPAL BENCH, COURT NO. III

Excise Appeal No. 1140 of 2007-SM(BR)

[Arising out of Order-in-Appeal No. 26/RPR-I/2007 dated 31.1.2007 passed by the Commissioner of Customs & Central Excise (Appeals), Raipur (CG)]

For approval and signature:

Hon'ble Mr. M. Veeraiyan, 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?	:	Seen
4. Whether Order is to be circulated to the Departmental authorities?	:	Yes

Commissioner of Customs,
Central Excise, Raipur — Appellants

Vs.

M/s. Indo Lahiri Bio Power Ltd. — Respondent

Appearance:

Shri S.N. Srivastava, SDR for the Appellants
Shri Atul Gupta, Advocate for the Respondent

Date of Hearing/decision : 5.5.2010

final **ORAL ORDER NO. 515/2010 SM (BR)**

Per M. Veeraiyan:

This is an appeal by the department against the order of the Commissioner (Appeals) No. 26/RPR-I/2007 dated 31.1.07.

2. Heard both sides extensively.

3. The relevant facts, in brief, are that the officers visited the factory premises of the respondent on 19.11.03; they found the RG I and raw material register completed only upto 15.9.03. The officers directed Shri Pradeep Agrawal MD of the Company to declare the stock of inputs and finished goods physically lying in the factory premises as on 19.11.03 and apparently he submitted a statement based on other records maintained by them. Physical stock of finished goods namely, MS ingots was ascertained and found to be 39.402 MT which was short by 15.928 MT compared to stock declared by him. The value of the short found goods is Rs.2,03,926/-. The respondents paid the duty on the short found goods on the very same date. Certain other private records including the records maintained in the form of consumption slips, production slips were also recovered. In addition, records maintained by persons of security agency posted at the gate were resumed. The statement of Shri Vimal Kumar Ganguly, Security in-charge and statement of Shri Santosh Modi, Proprietor of Bajrang Transport and statement of Shri Pradeep Agrawal, MD were taken. Show cause notice was issued alleging that the respondents have clandestinely cleared 438.53 MT of MS ingots valued at Rs.56,14.500/- and, accordingly,

proposing duty of Rs.8.98,320/- in addition to proposing confirmation of duty of Rs.32,628/- paid by them and also proposing imposition of penalties on these persons. Original authority confirmed the demand of duty as proposed in the show cause notice and imposed equal amount of penalty under section 11AC read with Rule 25 of the Central Excise Rules, 2002. Commissioner (Appeals) while upholding the demand of duty of Rs.32,628/- and penalty of Rs.32,628/- set aside the rest of the demand and penalty.

4.1 Learned SDR appearing for the department, reiterated the grounds of appeal and submits that on the date of visit by the officers, the respondents were found to have not maintained the statutory records for about two months; there was shortage of finished goods; comparison of the private records relating to raw material issued with form IV accounts clearly revealed excess issue of raw materials; private records in the form of production slips and the computerised records indicated excess production; private records maintained at the gate indicated unaccounted clearances; the transporter has also corroborated the supply of trucks to the respondents company. Under these circumstances, the order of the original authority confirming the demand of duty and imposition of penalty should be restored by setting aside the order of the Commissioner (Appeals).

4.2 He relies on the decision of the Tribunal in the case of Gulabchand Silk Mills Pvt. Ltd. vs. CCE, Hyderabad reported in [2005 (184) ELT 263] and submits that in any type of clandestine activity, the persons tried their best not to leave any evidence, and, therefore such persons cannot be expected to faithfully put the details of all such clearances in some register and append their signature.

5.1 Learned Advocate for the respondent submits that Shri Ganguly, security in-charge was not directly employed by them; they have not authorised the security in-charge to maintain any records relating to movement of vehicles in and out of factory; the transporter who claims to have given truck on hire to the respondent company has clearly stated that they themselves were not maintaining any records regarding giving trucks on hire. Under these circumstances, reliance placed on the entries made in the loose sheets maintained by Shri Ganguly was not proper. It was the general practice in the area for the Security in-charge not to maintain records relating to movement of vehicle. Though respondents made the submission during investigation, the department has chosen not to verify the practice or refute the same. Further, no owner of vehicles or drivers of the vehicles mentioned in the 'loose sheets' were contacted and their statements taken. No further statement was taken from Shri Ganguly, after MD of the respondent company disowned the records maintained by Shri Ganguly. Further, he submits that no buyers of the allegedly clandestine removed goods were contacted and their statements taken. In other words, the finding of the clandestine removal by the original authority is, therefore, not corroborated. Further the adjudicating authority was specifically requested to permit cross examination of Shri Ganguly "if adjudicating authority intends to give no credence to such documents". The adjudicating authority has not made available Shri Ganguly for cross examination.

5.2 He relies on the following decisions in support of his submissions:

1) Commissioner of Central Excise, Meerut vs. Raman Ispat (P)Ltd. 2000 (121) ELT 46 (Tri);

2) Commissioner of Central Excise, Chandigarh vs. Laxmi Engg.Works 2001 (134) ELT 811 (Tri-Del);

3) Oudh Sugar Mills Ltd. vs. Union of India 1978 (2) ELT (J 172) (SC);

4) Commissioner of Central Excise, Surat vs. Tulsi Polymers Pvt. Ltd. 2009 (247) ELT 223 (Tri-Ahmd.).

6.1 I have carefully considered the submissions from both sides and perused the records including translated copies of statements submitted as directed for by the Tribunal on earlier occasions. It is not disputed that the respondents have not maintained the statutory records namely, the daily production register and raw material register from 16.9.03 till the date of visit by the officers on 19.11.03. It is not being disputed that during this period, there were manufacturing activities and there were clearances by the respondent company. They were found maintaining private records including the computerised form of records but were not maintaining the statutory records. No explanation is forthcoming for the said failure on the part of the respondents. It was not shown that they have taken permission for maintaining the statutory records in the computerised form. The finding of the original authority was to the effect that the respondent company was found to have issued more quantity of raw materials for manufacture than what was mentioned in the form IV account. This discrepancy was said to be explained by the respondent by saying that the said loose sheets recovered from the factory were maintained by the labour contractors and same might relate to issue of raw materials in respect of other units. This explanation does not merit acceptance for the reason that the respondent company have failed to maintain statutory records though they were under obligation to maintain the same.

6.2 It is noticed that the quantum of clearances which were not covered by invoices were taken from the private records including the records maintained at the gate. The submissions of respondents that they did not authorise the security in-charge to maintain records relating to movement of vehicles in or out of factory deserves to be ignored. Any security agency is definitely concerned about the movement of persons as well as of vehicles and the goods coming in and out of the premises. As the security was supposed to check entry and exit of vehicles in and out of the premises, the claim that the security in-charge was not directly employed by the respondents does not diminish reliability of the records maintained by them as the records were maintained by an independent agency in their day-to-day operations. I find from the records that the respondents have not asked for cross examination citing any valid reason for such cross examination of Shri Ganguly. On the other hand not vague, request was made for cross examination only if the original authorities wanted to rely upon the documents maintained at the gate. In my opinion, such a request for cross-examination was not a serious request and was not substantiated and need not be considered. It is not as if cross examination is matter of right in adjudication proceedings, unlike in a prosecution proceedings in a court of law. However, the party to the notice was entitled to ask for cross examination citing reasons. In the present case, no valid reason was adduced for seeking cross examination. Merely because the order of original authority has gone against them, they have revived the grievance regarding not permitting the cross examination.

6.3 There is another valid reason for relying upon the records maintained by the security in charge. When the respondents have failed in their primary obligation to maintain statutory records from 16.9.2003, the department cannot be denied the opportunity of relying upon private records recovered from the factory gate and from other parts of their premises.

6.4 Undisputedly, on the date of visit of the officers, there was shortage of stock of 15.928 MT of MS ingots even out of stock declared by them on 19.11.03 before the visiting officers. No explanation has been offered for such shortage either in reply to the notice or thereafter. Such a shortage found on the date of visit and private records indicating excess issue of raw materials, production in excess of what is accounted in the statutory records and private records indicating clearances or movement of goods are sufficiently corroborative of each other.

7. Under these circumstances, the confirmation of demand of duty by the original authority was justified. The original authority has elaborately discussed the evidence with reference to daily entry reports which inter alia mention the material received, net weight of the goods and the time of arrival of the vehicle. He has also discussed the entries relating to productions of ingots, including the power consumption. Under these

circumstances, the reliance placed on the "loose sheets" recovered from the premises of the respondents were fully justified. The Commissioner (Appeals), on the other hand, has not correctly appreciated the above facts. It is not the case that the private records indicated the names of the parties to whom the goods were supplied and the investigating authorities have failed to conduct follow up action. The investigating officers have contacted the transport agency, who has confirmed giving trucks on hire to the respondent company. The finding of the Commissioner (Appeals) that the note book recovered from the control room of the Induction Furnace Section should not be relied upon and the documents recovered from the factory gate should not be relied upon for want of corroboration was not justified. Taking entire facts and circumstances into account, including shortage of the finished goods on the date of visit by the officers and the private records, the order of the original authority in confirming the demand and imposition of penalty is justified.

8. In view of the above, I set aside the order of the Commissioner (Appeals) and restore the order of the original authority.

9. The appeal is allowed.

(M. Veeraiyan)
Member(Technical)

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