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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/241 - 244 /2009 – SM [BR] Date 14/12/2010

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

To :
C.C.E. LUCKNOW
7-A, ASHOK MARG, LUCKNOW.

C.C.E. LUCKNOW Appellant

Vs

M/S SHRI BANKEY BIHARI CONCAST PVT. LTD. Respondent

I am directed to transmit herewith a certified copy of **Final order No**. 1395 – 1398 / 2010-SM[BR] dated 25.11.2010 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 SHRI BANKEY BIHARI CONCAST PVT. LTD.
IGLAS, ALIGARH.
2. Adv. / Consult SHRI RAJ KUMAR, [F.C.A.]
U-18, PAWAN PLACE, SAMAD ROAD,
ALIGARH [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 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 TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
14 Office Copy
15 Guard file

Assistant Registrar
(SM Appeal Branch)

2. M/S ANUPAM MAHESHWARI,DIRECTOR
M/S SHRI BANKEY BIHARI CONCAST(P) LTD,IGLAS,
ALIGARH.

3. SMT NIRMALA CHAUDHARI
W/O LATE SH KIRAN PAL SINGH, VILLAGE PALI, DISTT-FARIDABAD(OWNER OF TRUCK NO HR-38K-9123)

4. SHRI RAJEEV AGARWAL
S/O SH JAI PRAKASH AGARWAL,VILLAGE-PADAMPUR
SUKHROW, KOTDWAR, PAURI GARHWAL(OWNER OF TRUCK

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

Excise Appeal No.241-244 of 2009-SM

(Arising out of Order-in-Appeal No.105-108-CE/LKO/2008 dated 24.10.2008 passed by the CCE(A), Lucknow)

Date of Hearing/Decision: 25.11.2010

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

CCE, Lucknow — Appellant

Vs.

M/s.Shri Bankey Bihari Concast Pvt.Ltd. — Respondent
Shri Anup Maheshwari, Director
Shri Rajeev Agarwal, owner of truck
Smt.Nirmala Chaudhary, owner of truck

Present for the Appellant : Shri K.P.Singh, SDR
Present for the Respondent: Shri Raj Kumar, CA

Coram:
Hon'ble Mr.M.Veeraiyan, Member (Technical)

Final **ORDER No.** 1395-1398/2010 SM (BR)

PER: M.VEERAIYAN

These are four appeals filed by the department against the common Order-in-Appeal No.105-108-CE/LKO/2008 dated 24.10.2008. The Commissioner (Appeals) has set aside the order of the original authority confiscating the goods valued at Rs.12,74,262/-. He has also set aside the penalty of Rs.2 lakhs imposed on the director of the company and a penalty of Rs.2,07,960/- imposed on the respondent company. He set aside the confiscation of two trucks which carried the impugned goods and also penalties imposed on the owners of the trucks.

2. Heard both sides extensively.

3. The relevant facts of the case, in brief, are as follows:

(a) The officers of central excise intercepted, during transit check, two trucks carrying M.S.Ingots despatched from the respondent company.

(b) The vehicle No.HR-38K-9123 was found carrying 37.800 MT of M.S.Ingots and driver produced invoices No.102 dated 21.9.06 covering a quantity of 35.720 MT. According to the invoices, the goods have been removed from the factory at 17.20 hours on 21.9.06. Interception was made in the midnight on 22/23.9.06 nearly after 30 hours and interception took place at a place which was about 5 kms from the respondent company's factory. The driver Shri Chand in his statement stated that the goods were loaded from the factory in the evening on 22.9.06.

(c) The vehicle No.UP-20H-0160 carrying 35.015 MT of M.S.Ingots and the driver was in possession of invoice No.103 dated 21.9.06 covering a quantity of 35.360 MT, the documents indicated that the goods were loaded and despatched from the factory at 17.40 hours on 21.9.06. The vehicle was intercepted nearly after 30 hours alongwith above mentioned vehicle and the driver in his statement stated that the goods were loaded from the factory in the evening on 22.9.06.

(d) The officers visited the factory of the respondent company for verification and it was found that there was no discrepancies in respect of finished goods/raw materials.

(e) Shri Anup Maheshwari, Director of the company in his statement dated 23.9.06 claimed that the vehicle (UP-20H-0160) had broken down requiring repairs and hence there was some delay and the driver of the other vehicle has also stopped to give company to the said vehicle. The director informed that he came to know of these facts on ascertaining from the transport company. The authorised signatory of the company feigned ignorance of any clearance on 22.9.06. The goods and the vehicles were seized and the goods were provisionally released on execution of bond and furnishing of deposit of Rs.3,20,000/-.

(f) A show cause notice was issued proposing confiscation of the goods and trucks seized, and proposing penalties on the respondent company, director of the company and the owners of the trucks and the drivers.

(g) The original authority passed following orders:

"In the light of above, the following orders are passed:-

(a) I confiscate M.S.Ingots weighing 72.815 MT valued at Rs.12,74,262/- under Rule 25(1) of the Central Excise Rules, 2002. However, an option to redeem the same on payment of redemption fine of rs.3,20,000/- (Rs.Three lacs Twenty thousand only) is given to the party. The amount of Rs.3,20,000/- deposited as security for release of the goods be appropriated towards redemption fine and the goods be accounted for in the daily stock account and clearances be effected as per Rules.

(b) *Penalty of Rs.2,07,960/- (Rs.Two lacs seven thousand and sixty only) is imposed upon the Appellant nO.2 under Rule 25(1) (a) and (b) of the Central Excise Rules, 2002.*

(c) *Penalty of Rs.2,00,000/- (Rs.Two lac only) is also imposed upon Shri Anup Maheswari (Appellant No.2), Director of M/s.Shree Bankey Bihari Concast, Aligarh.*

(d) *Truck No.UP-20H-0160 is confiscated under Section 115 of the Customs Act, 1962 as make applicable to the like matters of Central Excise. However, an option of the same is allowed to the owner, Shri Rajeev Agarwal on payment of redemption fine of Rs.1,00,000/-. As the truck has already been released to Shri Rajeev Agarwal owner of the truck the remediation fine be appropriated from the security furnished for provisional release of the truck.*

(e) *A penalty of Rs.36,000/- is imposed upon Shri Rajeev owner of the truck No.UP-20H-0160 under Rule 26 of Central Excise Rules, 2002, and be appropriated from the amount of the security furnished for provisional release of the said truck.*

(f) *Truck No.HR-38K-9123 is confiscated under Section 115 of the Customs Act, 1962 as make applicable to the like matters of Central Excise. However, an option to redeem the same is allowed to the owner Shri Rajeev Agarwal on payment of Redemption fine of Rs.1,26,000/-. As the truck has already been released to Smt. Nirmala Chaudhary, wife of Late Shri Kiran Pal Singh owner of the truck the redemption fine be appropriated from the security furnished for provisional release of the truck.*

(g) *A Penalty of Rs.50,000/- is also imposed upon Smt.Nirmala Chaudhary, owner of truck No.HR-38K-9123 under Rule 26 of Central Excise Rules, 2002 and be appropriated from the amount of the security furnished for provisional release of the said truck.*

(h) *A penalty of Rs.1,000.00 (Rs.One Thousand only) is imposed upon Shri Papu S/o of Shri Ram Swaroop, Village Chuharpur,* *Aligarh, driver of truck No.UP20H-0160, under Rule 26 of the Central Excise Rules, 2002.*

(i) *A penalty of Rs.1,000.00 (Rs.One Thousand only) is imposed upon Shri Chand Khan S/o of Shri Mansoor Khan, Village Chandpur, Bulandshahr, under Rule 26 of the Central Excise Rules, 2002."*

4. All the parties, except the two drivers filed appeals before the Commissioner (Appeals) and the Commissioner (Appeals) has set aside the order and allowed all the appeals.

5. Learned SDR submits that the order of the Commissioner (Appeals) has not taken the relevant facts into account. In particular, the variation in weight between the invoices produced and the quantities found has not been appreciated; wide gap of 30 hours between the time of despatch as per invoices and the time of seizure has not been appreciated; the statements of the drivers that loading of the goods took place in the evening on 22.8.06 has not been considered especially when the drivers have not given any retractions. He submits that the claim of the director of the company that he learned from the transporter that one of the trucks developed snag and both truck drivers were waiting for repairs has been wrongly accepted. Therefore, he seeks setting aside the order of the Commissioner (Appeals) and restoration of the order of the original authority.

6. Learned CA for the respondents strongly supported the order of the Commissioner (Appeals). He submits that verification by the officers at the factory premises revealed no major discrepancies in stock. If the allegation that what was found and seized on 22.9.06 were clearances for a second time then the department should have noticed variation in stock of finished goods and the raw materials

which is not the case. The department has not relied on any evidence regarding any excess raw materials used to produce such goods. The department has not conducted any verification with the transport company even after the director of the respondent company revealed that the time gap was due to the fact that one of the vehicles developed snag on the road. Therefore, he submits that confiscation of the goods and imposition of penalties on the respondent company and the director of the respondent company are not justified.

7. Learned CA also submits that the vehicle owners as well as the drivers who were in charge of the vehicles were not found to have any knowledge of alleged clandestine removal and, therefore, confiscation of the vehicles used for transportation was not warranted and for the same reason, no penalty on the owners of the vehicles was also warranted. He also relies on the decision of the Tribunal in the case of Utility Alloys Pvt.Ltd. vs. CCE, Cochin reported in 2005 (184) ELT 80 and submits that mere statements of the drivers cannot be the sole basis for sustaining demand holding that there was clandestine removal in the absence of any corroborative evidence.

8. I have carefully considered the submissions made from both sides and perused the records. At the outset, it is noticed that the two trucks were intercepted at distance of about 5 kms from the factory. The statements of the drivers who were in charge of the vehicles clearly indicated that the goods in question have been loaded from the factory just a few hours before i.e. in the evening on 22.9.06. No doubt that the drivers had been entrusted with the invoice No.102 dated 21.9.06 indicating clearance at 17.20 hours on 21.9.06 and invoice No.103 dated 22.9.06 indicating clearance at 17.40 hours. The interception of the trucks has taken after nearly 30

hours. The respondent company has tried to explain the reasons for the delay as due to one of the trucks developing snag and claimed that there was no double transportation. This claim is obviously contrary to the statements of the drivers. It is not disputed that the drivers have not retracted the statements. Mere denial of facts while filing replies cannot be treated as retraction of the statements. Further, it was claimed that there was break down of one of the vehicles, which was said to have left at 17.40 hours on 21.09.06; but no further details like where the vehicle broke down and what repair was done and how the other vehicle which left earlier retuned to the spot where the second vehicle has broken down were revealed. Further, according to the invoice No.102 dated 21.09.06, the weight of the consignment cleared was 35.720 MT whereas the weight of the consignment as ascertained by the officers was 37.800 MT. Similar variation was noticed in respect of the goods in the second truck. If the consignment cleared under invoice No.102 dated 21.09.06 was the same as the consignment seized by the officers, then there was no valid explanation offered for the variations in the quantity of the goods.

9. The Commissioner (Appeals) without appreciating the above relevant facts in its totality, has held that the officers did not find any variation in the stock of finished goods and the raw materials when they conducted the follow up action. This approach cannot be appreciated and upheld. The alleged explanation of the Transport Company that one of the vehicles has developed snag and hence there was a time gap of 30 hours, should also have been appreciated taking the totality of facts and circumstances of the case. Further the explanation given by the transport company is without relevant details ,as mentioned earlier and apparently solicited by the director

of the respondent company and therefore, the order of the Commissioner(Appeals) allowing the appeal of the respondent company and the director of the respondent company cannot be upheld.

10. However, as rightly pointed out by the ld. CA, it is noticed that the drivers of two trucks were carrying the goods alongwith invoices entrusted to them by the respondent company. There is no evidence that the drivers who were in charge of the vehicles at the relevant time were aware that the company has done any manipulation and that the invoices given to them were not covering the goods transported by them. There are no statements taken from the owners of the trucks and therefore the question of attributing any knowledge to the owners of vehicles about unaccounted clearances indulged in by the respondent company does not arise. On these grounds, the order of the Commissioner (Appeals) insofar as the same related to the setting aside of confiscation of the trucks and setting aside the penalties on the owners of the trucks call for no interference.

11. In view of the above, the order of the Commissioner (Appeals) insofar as the same related to the respondent company and the respondent director are set aside and the order of the original authority in this regard is restored. While restoring the order of the original authority, taking the entire the facts and circumstances of the case into account, the redemption fine of Rs.3,20,000/- is reduced to Rs.2 lakhs. The penalty of Rs.2 lakhs imposed on Shri Anup Maheshwari, director is reduced to Rs.50,000/-. But for the above modifications, the order of the original authority stands fully

restored, in so far as the same related to the respondent company and its director.

12. The other two appeals of the department (No.E/242/09 and E/243/09) are rejected.

(Dictated and Pronounced in the open court)

(M.VEERAIYAN)
MEMBER (TECHNICAL)

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