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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/243 /2008 – SM[BR] E / CO / 68 / 2008 –SM[BR] Date 12/02/2010

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 S.S. MOULDER PVT. LTD. Respondent

I am directed to transmit herewith a certified copy of **Final order No.** 198 / 2010 –SM[BR] dated 4.2.2010 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 S.S. MOULDER PVT. LTD.

   AKLORDIH, HATHKHOJ, INDUSTRIAL AREA, BHILAI, DISTT DURG (CG.)
2. Adv. / Consult SHRI L.P. ASATHANA ADV.
   R-163, IINDFLOOR G.K. PART-I
   NEW DELHI -110048.

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 AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI PRINCIPAL BENCH, COURT NO. III

Excise Appeal No. 243 of 2008-SM(BR)
Excise Cross Objection No. 68 of 2008-SM(BR)

[Arising out of Order-in-Appeal No. 160/RPR-II/2007 dated 31.10.2007/02.11.2007 passed by Commissioner (Appeals), Customs & Central Excise, Raipur]

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 Central Excise
Raipur — Appellants

Vs.

M/s. S.S. Moulders (P) Ltd. — Respondent

Appearance:

Shri S.K. Bhaskar, DR for the Appellants
Shri A. Jaju, Advocate for the Respondent

Date of Hearing/decision : 4.2.2010

Final **ORAL ORDER NO. 198/2010 SM-(BR)**

Per M. Veeraiyan:

This is an appeal by the Department against the order of the Commissioner (Appeals) No. 160/RPR-II/2007 dated 31.10.2007/2.11.2007. Cross Objection 68/2008 is connected to this appeal.

2. Heard both sides.

3. When the officers visited the factory premises on 30.6.06, they found shortage of finished goods and raw materials totally valued at Rs.24,36,040/-. For eg. as against the booked stock of 45.8 MT of pig iron a raw material on Cenvat credit has been taken, the stock available was nil. In respect of ingots moulds as against the recorded stock of 124.055 MT what was found was only 51.300 MT. The Director of the Company admitted the shortages of raw materials and finished goods and paid up the Cenvat credit involved on the raw materials and duty involved on the finished goods found short. Total amount involved is Rs.3,97,591/- and the same stands paid. The respondents is not disputing the duty liability having paid the same before the issue of show cause notice. Show cause notice was issued on 17.1.07 inter-alia proposing the penalty under Rule 25 of the Central Excise Rules, 2002 for contravention of Rules 4, 6, 8, 10 and 11 of the said Rules. The original authority while appropriating the duty already paid, after confirming the demand held that no penalty was imposable. He also relied on the decision of the Tribunal in the case of Rashtriya Ispat Nigam Ltd. vs. CCE reported in [2003 (161) ELT 285 (CEGAT)] and noted that Departmental appeal against the said decision has

been dismissed by the Hon'ble Supreme Court as reported in [2004 (163) ELT A53 (SC)]. On appeal by the Department, Commissioner (Appeals) upheld the decision of the original authority in not imposing the penalty.

4. Learned DR reiterating the grounds of appeal submits that the respondents have not disputed the shortage in stock of raw materials and finished products and have paid the duty thereon which implied that they had admitted that they had clandestinely removed the goods. Therefore, he submits that it was a case of removal without payment of duty, without assessment and without proper maintenance of the records of stock of raw materials and finished goods.

5. Learned advocate for the respondents strongly supports the order of the original authority and the Commissioner (Appeals) in not imposing the penalty by referring to the grounds of Cross Objection. He submits that there is no specific allegation in the notice for alleged clandestine removal.

6. I have carefully considered the submissions from both sides. Prima facie, my observations are as follows: It is an admitted case of shortage of both raw materials and finished goods. I find from the show cause notice that out of recorded stock of 45.8 MT of pig iron on which Cenvat credit has been taken, no quantity whatsoever was available on the date of visit. This is highly surprising and the Director of the respondent Company merely admits the shortage and no explanation whatsoever has been given for such wholesale shortage. There was shortage of other inputs and finished goods as well. In a case involving huge shortage of inputs and shortage of finished goods, prima facie it cannot be treated as merely a case of improper

maintenance of accounts. The Director's explanation that due to personal problem, accounts have not been written properly has been blindly accepted by the authorities below. The quantum of shortage in respect of each material and the explanation, if any, given in reply to the show cause notice should have been analysed. In this case, both the original authority and the Commissioner (Appeals) have refrained from imposing penalty. The basis on which reliance was placed on the decision of the Tribunal in the case of Rashtriya Ispat Nigam Ltd., to the facts of the present case has not been discussed.

6. The departmental appeal itself has been filed without application of mind. The prayer in the appeal is to set aside the order-in-appeal dated 31.10.07/ 2.11.07. Mere setting aside the order in appeal cannot grant any relief to the Department as the order in original is also against the Department in so far as the imposition of penalty is concerned. The prayer also includes "to pass any order as deemed fit".

7. Inasmuch as prima facie the huge shortages (in one case 100%) has not been examined in proper prospective by both the authorities below. I deem it appropriate to set aside the orders of both the authorities and remand the matter to the original authority for consideration. Since I am remanding the matter to the original authority, my above observations are to be treated as prima facie view and the original authority is bound to take

independent decision discussing the relevant facts and after granting reasonable opportunity of hearing to the respondents.

8. The appeal is allowed by way of remand as above. Cross Objection is also disposed of.

(M. Veeraiyan)
Member(Technical)

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