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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/701 /2008 – SM[BR] WITH E / CO / 258/2008-SM[BR] Date 26/02/2010

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 KUMAR INDUSTRIES Respondent

I am directed to transmit herewith a certified copy of **Final order No**. 262 / 2010 –SM[BR] dated 20.1.2010 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 KUMAR INDUSTRIES

   C-2, INDUSTRIAL AREA,NADARGANJ,LUCKNOW (U.P.)

2. Adv. / Consult SHRI S. N. SRIVASTVA ADV.
   C-5, SECTOR-B, ALIGANJ
   LUCKNOW-226024.

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)
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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:20.01.2010

Excise Appeal No.E/701/08 with
Excise C.O. No. E/CO/258/08

[Arising out of Order-in-Appeal No.156-CE/LKO/07 dated 25.10.2007 passed by the Commissioner (Appeals), Lucknow].

For approval and signature:

Hon'ble Mr.Rakesh Kumar, 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?	

CCE, Lucknow ...Appellant

Vs.

M/s.Kumar Industries ... Respondent

Present for the Appellant : Shri.Saini, DR
Present for the Respondent: Shri.Arun Srivastava, Advocate

Coram: Hon'ble Mr. Rakesh Kumar, Member (Technical)

Final **ORDER NO.** 262/2010 SM(BR) **DATED:20.01.2010**

PER: RAKESH KUMAR

The facts leading to this appeal by the Revenue and filing of cross objection by the respondent are, in brief, as under:-

1.1 The Respondents are manufacturers of MS angles, MS bars & MS flats chargeable to central excise duty under heading 721669.00 721114.90 and 721491.90 of Central

Excise Tariff. On 7.2.06, their factory was visited by the jurisdictional central excise officers who checked the stock of the finished goods. Since there was no weighment facility in the factory and the Respondent expressed difficulty in arranging weighment of the goods from outside, it was agreed to determine the weight by weighing the representative samples from each lot of MS angles, MS bars and MS flats and then multiplying the weight of the representative sample by the number of pieces of that items. The weighment of MS angles, bars and flats was determined in this manner under Panchnama. It was found that as against the weight of 629.69 MT of MS angles, as recorded in the RG 1, the actual weight of MS angles was 734.484 MTs and similarly, as against the recorded weight of 63.89 MT of MS bars in the RG-1 Register, the actual weight of MS bars was 65.52 MTs. and as against the weight of 142.42 MT of MS flats recorded in the RG 1 Register, the actual weight was 149.80 MTs. Thus, there was excess of 104.794 MTs. of MS angles, 1.630 MT of MS bars and 7.38 MTs of MS Flats. These goods totally valued at Rs,19,36,470/- were placed under seizure. A show cause notice was issued proposing the confiscation of excess stock under the provisions of Rule 25 (1) of Central Excise Rules 2002 and also for imposition of penalty on the Respondent under this rule. The show cause notice was adjudicated by the Asstt. Commissioner vide Order in Original dated 28th May, 2007 by which seized goods totally valued at Rs.19,36,470/- were ordered to be confiscated under rule 25 (1) (b) of Central Excise Rules 2002 with option to be redeemed on redemption fine in lieu of confiscation of Rupees Five Lakhs, in addition to payment of duty. Penalty of Rs.3,16,032/- was imposed on the Respondent under the same Rule. On appeal to Commissioner (Appeals) against this order, the Commissioner (Appeals) vide the impugned order in appeal No. 156-CE/LKO/07 dated 25.10.2007 set aside the Asstt. Commissioner's order, on the ground that –

(a) weighment of MS angles, MS bars and MS flats had not been determined by actual weighment but by estimation only on the basis of the weight of representative samples of each item and there after by multiplying the weight of representative samples by number of pieces which is not the correct method and hence the weight of each item as ascertained cannot be said to be the correct weight; and

(b) Just because there was excess of finished goods, it cannot be concluded that the same were meant for clandestine clearances and hence liable for confiscation.

1.2 It is against this order of the Commissioner (Appeals) that the present appeal has been filed by the Revenue. The Respondents have filed the cross objection in respect of this appeal.

2. Heard both the sides.

2.1 Shri R.K. Saini, ld. D.R. assailed the impugned order reiterating the grounds of appeal in the revenue's appeal. He pleaded that as mentioned in Panchnama, the weight of MS angles, bars and flats had been ascertained by weighing the representative samples from the MS angles, bars and flats and there after by multiplying the weight of the representative sample from the number of pieces of MS angles, bars and flats, that this method of weighment had been adopted with the consent of the Respondents and there was no objection from them for ascertaining the weight by this method, that at the time of weighment, the excess quantity in respect of MS angles, bars and flats had been accepted by the Respondent, that mere non-recording of production of finished goods in the prescribed central excise records would attract confiscation and penalty under the provisions of Rule 25 (1) (b) of the Central Excise Rules, that under the clause (a) of sub-rule (1) of Rule 25 for confiscation of the goods and imposition of penalty, it is not necessary to prove that the excess unaccounted stock of finished goods was meant for clandestine removal as mens rea is not the requirement of this sub-rule and that in view of this, the impugned order setting aside the confiscation of the goods and penalty is not correct.

3. Shri Arun Srivastava, Advocate, ld. Counsel for the Respondent, reiterating the submissions made in the Cross-Objection pleaded that the weighment had been done by estimating stock on average weight basis which is unreliable and, hence, it cannot be said that there was excess stock, that the statement of partner of the Respondent company admitting the excess stock is not counter signed by the recording officer and hence no cognisance can be given to the same, that there is no evidence that there was any intention on the part of the Respondent to clear any goods clandestinely

without payment of duty, that merely on the basis of alleged excess stock of MS angles, bars & flats, whose weight has been determined by estimation only, not by actual weighment, it cannot be alleged that there was excess stock not accounted for in the RG-I Register, that in this regard he relies upon the Tribunal's judgment in the case of Rana Concast Ltd. Vs. CCE, Meerut-I reported in 2004 (177) ELT 483 (Tribunal-Delhi), that confiscation of allegedly unaccounted finished goods was not warranted when there is no evidence that the goods were going to be removed clandestinely without payment of duty and in this regard, he relies upon the Tribunal's judgment in the case of Bhusan Ltd. Vs. CCE, Kolkata-IV reported in 2005 (186) ELT 197 (Tribunal-Kolkata), and that, therefore, the Commissioner (Appeals)'s order setting aside the Asstt. Commissioner's order of confiscation and penalty is correct.

4. I have carefully considered the submissions from both the sides and perused the records. While there is no dispute about the fact that the weighment of MS angles, bars and flats had not been determined by actual weighment, from the Commissioner (Appeals)'s observations in para 6 of the Order in Appeal, and from the facts narrated in the Panchnama dated 8.6.06, it is clear that the officers had earlier requested Shri.Shamit Chand Wani, partner of the Respondents firm to arrange physical weighment of the entire stock of finished goods from outside, but since the Respondents expressed difficulty, on their request it was decided to ascertain the weight of the stock of MS angles, bars & flats by taking representative samples from each lot and multiplying the each

sample's weight by the number of pieces of that item. In view of this, it cannot be said that the weight of MS angles bars and flats had been determined purely by eye estimation. By determining the weight in this method excess to the tune of 104 MT in respect of MS angles is not possible, though in respect of MS flats & bars where the alleged excess is 1.63 MT and 7.3 respectively, the benefit of doubt can be given. Therefore, in respect of MS angles, the Commissioner (Appeals) finding that there was no excess is not correct. The judgement in the case of Rana Concast Ltd. (supra) cited by the Appellant is not relevant as this is not a case where weight of the finished goods had been determined purely by eye estimation.

5. As per the provisions of clause (b) of sub-rule (2) to Rule 25 of Central Excise Rules 2002, nonaccountal of excisable goods produced or manufactured, attract confiscation and penalty. Rule 10 of the Central Excise Rules prescribes that "every assessee shall maintain proper records on daily basis in a legible manner indicating the particulars regarding description of the goods produced or manufactured, opening balance, quantity produced or manufactured, inventory of goods, quantity removed, assessable value, the amount of duty payable and particulars regarding amount of duty actually paid." Since in this case, it is clear that the stock of 104. 79 MTs of MS angles had not been recorded in the RG1 Register, the provisions of Rule 25 (1) (b) would be attracted in respect of these goods. From the language of rule 25 (1) (b) of Central Excise Rules, it is clear that mere non-recording of production in the RG 1 Register would attract confiscation and penalty and

in this regard mens-rea is not required to be proved. Hon'ble Bombay High Court in the case of Kirloskar Brothers Vs. U.O.I. reported in 1988 (34) ELT 30 (Bombay) has held that non-accountal of goods in RG-I Register is sufficient to attract penalty under Rule 173 Q (1) of Central Excise Rules, 1944, without going into the question of mens rea. This judgement of Hon'ble Bombay High Court has been followed by the Tribunal in a series of judgements in the cases of CCE, Indore vs. Ratlam Staw Board reported in 2002 (148) ELT 112 5; CCE Delhi-III vs. Diamond Plywood Industries reported in 2003 (159) ELT 584 and in CCE, Vapi vs. Modipon Ltd. reported in 2006 (203) ELT 521 (Tribunal-LB). The last judgement is of a Larger Bench, while the judgement in the case of Bhusan Ltd. vs. CCE, Calcutta-IV (supra) is of a Single Bench. I, therefore, set aside and the order of the Asstt. Commissioner regarding confiscation of MS angles in restored. However the CCE (Appeals) order in respect of MS bars and MS flats is upheld. Looking to the fact that this is only a case of non-recording of production in the RG-1 register and as such there is no evidence that the Respondents were indulging in duty evasion by clandestine clearances, the redemption fine in lieu of confiscation is reduced to Rs.3,00,000/- and penalty is reduced to Rs.50,000/-. The Asstt. Commissioner's order stands restored with the above modification. The Revenue's appeal and the Cross-Objection stands disposed of as above.

[Dictated & Pronounced in the open Court].

(RAKESH KUMAR)
MEMBER (TECHNICAL)

Anita