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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/913 /2008 – SM[BR] WITH E / CO / 255 / 2008 –SM[BR] Date 26/02/2010

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 ALFA SPRINGS LTD. Respondent

I am directed to transmit herewith a certified copy of **Final order** No. 264 / 2009 –SM[BR] dated 17.2.2010 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 ALFA SPRINGS LTD.

   B-3 & D-7, UPSIDC INDUSTRIAL AREA,ORAI.

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)

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17 Guard file

Assistant Registrar
(SM Appeal Branch)

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.
Principal Bench, New Delhi

COURT NO. III

Excise Appeal No. 913 of 08 with C.O. No. 255 of 08 (SM)

[Arising out of the Order-in-Appeal No. 46-CE/APPL/KNP/2008 dated 21/02/2008 passed by The Commissioner (Appeals), Customs and Central Excise, Kanpur.]

For Approval and signature :
Hon'ble Shri 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 would 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 Department Authorities?	:

CCE, Kanpur — Appellant

Versus

M/s Alfa Springs Ltd. — Respondent

Appearance

Shri V.K. Saxena, Departmental Representative (JCDR) – for the appellant.

None – for the respondent.

CORAM : **Hon'ble Shri Rakesh Kumar, Member (Technical)**

DATE OF HEARING : 17/02/2010.

Final Order No. 264/2010 SM (BR) Dated : ___________

Per. Rakesh Kumar :-

The respondents are manufacturers of M.S. Bars chargeable to Central Excise Duty under sub-heading 7144 99 90 of the Central Excise Tariff Act, 1985. Their factory was visited by the Jurisdictional Central Excise Officers on 19/9/05 and physical stock taking was conducted in the presence of independent panch witnesses in course of which the shortage of 47.800 MT in the stock of M.S. Bars was detected. Shri P.C. Sinha, Authorised Signatory was present at the stock taking and he agreed with the shortage detected by the officers and stated that the goods found short has been removed in his presence without payment of duty and without issuing invoice. The duty involved on the goods was Rs. 1,34,986/- was paid on 21/9/05. However, subsequently, a show cause notice was issued to the respondent for confirming the duty demand and also imposition of penalty under Section 11AC for clandestine removal of the finished goods without payment of duty. The Assistant Commissioner vide order-in-original dated 19/2/07 confirmed the duty demand and ordered appropriation of the amount already paid towards the duty demand and beside this imposed penalty of Rs. 1,34,986/- on the respondent under Section 11AC. The Commissioner (Appeals), however, on appeal by the respondent vide order-in-appeal dated 21/2/08 set aside the order of penalty on the ground that there was no evidence that the goods found short had been clandestinely cleared and also that the entire duty had been paid prior to the issue of show cause notice. It is against this order that the present appeal has been filed by the Revenue.

2. None appeared for the respondent though notice has been issued to them, however, respondent have filed cross-objection registered as E/CO/255/08. Heard Shri V.K. Saxena, learned Departmental Representative, who pleaded that the respondent do not dispute the shortage of 47.800 MT in the stock of MS Bars and at the time of stock taking the authorized signatory had admitted the removal of this quantity without payment of duty. From this, it is clear that the goods found short have been removed clandestinely and no further evidence in this regard is necessary and that in view of this, the penalty under Section 11AC has been rightly imposed by

the Assistant Commissioner. He pleaded that just because the duty had been paid prior to the issue of show cause notice, the penalty under Section 11AC cannot be waived as has been done by the Commissioner (Appeals). According to the learned DR, since the elements for invoking Section 11AC are present in this case, the penalty as per the provisions of this section should have been imposed and in this regard, he cited the judgment of Hon'ble Supreme Court in the case of **Union of India vs. Rajasthan Spinning & Weaving Mills** reported in **2009 (238) E.L.T. 3 (S.C.).**

3. I have carefully considered the submissions of the learned Departmental Representative and also the submission made by the respondent in their cross objection. The shortage of finished goods has not been disputed and the authorized representative of the respondent at the time of stock taking had clearly stated that goods found short must have been removed without payment of duty and without issue of invoices and this statement has not been retracted. Moreover, I also take note of the fact that the goods MS Bars are evasion prone items. In view of this, the Commissioner's finding that there was not enough evidence the goods have been found

short without payment of duty is not correct. The ground for waiving the penalty, mentioned in the impugned order is also not correct as just because in the case of clandestine removal, the duty had been paid prior to the issue of show cause notice, it does not save the assessee from the provisions of Section 11AC. Hon'ble Rajasthan High Court in a recent judgment in the case of Union of India vs. Rajasthan Spinning & Weaving Mills (supra) has held that penalty under Section 11AC would be attracted if the element for imposition of penalty under this Section are present. Since, this is a case of clandestine removal, the provisions of Section 11AC would be attracted. In view of this, the impugned order setting aside the penalty is not correct. The same is set aside and the order-in-original of Assistant Commissioner is restored. The Revenue's appeal is allowed.

(Dictated and pronounced in open court)

(Rakesh Kumar)
Member (Technical)

PK