TELEGRAM : CEGCANAL

Website : www.cestat.gov.in

REGISTERED / AD

Email : delhi@cestat.gov.in

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/3043/2007-3044/2007 – SM[BR] Date 08/03/2010

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

1. M/S RHYDBURG PHARMACEUTICALS LTD.
2. SH. DALJEET SINGH, DIRECTOR
RHYDBURG PHARMACEUTICALS LTD., PLOT NO C-2
& 3, SARA INDUSTRIAL ESTATE, RAMPUR,
CHAKARATA ROAD, DEHR

SH. DALJEET SINGH, DIRECTOR Appellant

Vs

C.C.E. DELHI III Respondent

I am directed to transmit herewith a certified copy of **Final order No**. 282 – 283 / 2010 –SM[BR] dated 3.3.2010 passed by the Tribunal under Section 35-C(1)of Central Excises Act, 1944

Assistant Registrar
(SM Appeal Branch)

Copy to :

1. Respondent

C.C.E. DELHI III

UDYOG MINAR, UDYOG VIHAR, VANIJYA NIKUNJ, PHASE V, GURGAON - 122016 (HARYANA)

2. Adv. / Consult SHRI RAJESH GUPTA ACA,
SHOP NO. 3, FIRST FLOOR SHALEEN ARCADE
21- NEW ROAD, DEHRADUN

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 NEW DELHI

Appeals Nos.3043-3044 of 2007- SM (BR)

[Arising out of Order-in-Appeal No.431-432/KKG/RTK/2007 dated 25.09.2007 passed by the Commissioner of Central Excise (Appeals), Gurgaon]

Date of Hearing/ Decision:03.03.2010

For approval and signature:

Mr. M. Veeraiyan, Member (Technical)

1. Whether Press Reporters may be allowed to see 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

(1) Rhydburg Pharmaceuticals
(2) Shri Daljit Singh,Director ...Appellants
(Rep. by Shri Rajesh Gupta, Chartered Accountant)

Vs.

CCE, Delhi-III ...Respondent
(Rep. by Shri I. Baig, SDR)

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

Order No. 282-283/2010 SM (BR)/Dated:03.02.2010

Per M. Veeraiyan:

These two appeals, one by the Company, M/s. Rhydburg Pharmaceuticals Ltd. and the other by Shri Daljeet Singh, Director of the Company, arise out of the Order-in-Appeals No.431-432/KKG/RTK/2007 dated 25.09.2007.

2. The relevant facts, in brief, are that the appellant company was visited by the officers on 26.11.2005; no discrepancy was noticed in respect of stock of finished goods; discrepancy in stock relating to raw materials, which were bulk drugs were noticed and value of the goods found short was Rs.6,19,580/- and Cenvat credit availed in respect of the said material was Rs.1,01,115/-. The Director of the Company was present at the time of stock taking and he admitted the shortage and he stated that he could not explain the reasons for the shortage as he was busy in some other work during the last 3 to 4 months. He gave his opinion that the shortage might be due to pilferage or due to use of the goods in the manufacturing process of the finished goods, which have been damaged and such damaged finished goods having not been accounted for. He deposited the amount equal to the credit taken on 26.11.2005 itself. Show cause notice dated 30.05.2006 was issued proposing recovery of cenvat credit involved and proposing penalty under Rule 15 (2) of the Cenvat Credit Rules, 2004 read with Section 11 AC of the Central Excise Act, 1944. Show cause notice also proposed penalty on Shri Daljeet Singh, Director. The Original Authority confirmed the demand as proposed in the show cause notice and imposed equal amount of penalty on the appellant company and a sum of Rs.5,000/- on the Director. On appeal by the parties, the Commissioner (Appeals) rejected their appeals and upheld the order of the Original Authority.

3. Ld. Chartered Accountant submits that the shortage relates to bulk drugs, which cannot be disposed of in the open market as they could not be consumed as such even for treatment of any disease unless and until they are converted as formulations; that the shortage might have been due to not taking into account the inputs contained in the goods under process. At any rate, no evidence of clandestine removal of the inputs has been relied upon by the Department. As the shortage could not be explained, the credit involved has been paid. He submits that the ingredients of Section 11 AC are not present. Ld. Chartered Accountant also relies on the decision of the Hon'ble Supreme Court in the case of Rajasthan Processing and Weaving Mills Ltd. reported in 2009 (92)ELT 691. He submits that in the absence of fraud, collusion, wilful mis-statement or suppression of facts, proviso to Section 11AC is not attracted.

4. Ld. SDR submits that the stock taking was done in presence of witnesses and the Director of the Company. No valid reasons have been given by the Director of the Company, who was looking after day-to-day activities of the Company. Under these circumstances, obviously, the raw materials found short were cleared clandestinely and, therefore, the appellant company, which was operating under self-removal procedure is liable to penalty under Section 11 AC read with Rule 15 (2) of the Cenvat Credit Rules. The Director, who was looking after the day-to-day

activities, has to be treated as custodian of the goods and as he was not in position to explain the reasons for shortage, he was also liable for penalty.

5. I have carefully considered the submissions from both sides. The stock taking was done in presence of Panch witnesses and the Director of the Company. The shortage was admitted by the Director on the date of stock taking and the credit involved on the short found raw materials stands paid on 26.11.2005 itself. The explanation offered for shortage was in the nature of the opinion of the appellant-Director and the same is not convincing. Further, before the Original Authority, the appellant-Company did not dispute the liability of duty. Therefore, the submissions in the appeal memorandum questioning the shortage is not work-considering. The Original Authority has held as under:-

> *"I find that the shortage of inputs found in stock is sufficient to substantiate clandestine removal of the goods."*

The Commissioner (Appeals) also came to similar conclusion with the following findings:-

> *"The appellants failed to maintain stock properly as required under the Rules. Therefore, it is the sufficient reason to conclude that the impugned inputs/raw materials had found their way clandestinely outside the factory premises without reversal of Cenvat credit/payment of duty and such removal can not take place without the active role of the appellant company itself and, Shri Daljit Singh, Director of the appellant company."*

The appellant-company having received the inputs and having taken credit was under strict obligation to account for the inputs on which Cenvat credit has been taken. On their failure to do so, they were certainly required to reverse the credit availed by them. In a case where the goods accounted in RG-23, Part-I was not found, certainly a case of irregular maintenance of accounts is also established. However, the allegation of clandestine removal of the goods is a serious one and requires corroborative evidence. No such evidence has been relied upon in the show cause notice. In fact, the extent of shortage though given in absolute terms does not indicate the comparative figures i.e. the stock as per book and the physical stock, which was available. Such an analysis would have shown whether the shortage was significantly high or only marginal. At any rate, the charge of clandestine removal cannot be upheld merely based on presumptions and possibilities. The submissions that the Director of the Company, who looks after the day-to-day activities, is the custodian of the raw materials cannot be accepted. In fact, the statements given by the Director indicates that he was not visiting the factory regularly for 3 to 4 months. The question of sustaining penalty on the Director does not arise. However, as rightly held by the Commissioner (Appeals), the appellant company has failed to maintain stock accounts properly and to that extent, they are liable to penalty under Rule 27 of the Central Excise Rules, 2002.

6. In view of the above, the appeals are disposed of as follows:

(A) The duty demand is confirmed.

(B) The Penalty of Rs.1,01,115/- imposed under Section 11 AC read with Rule 15 (2) is modified as penalty under Rule 27 of the Central Excise Rules, 2002 and consequently reduced to Rs.5,000/- (Rupees Five Thousand only).

(C) The penalty imposed on the Director is set aside.

Order dictated & pronounced in open court on 03.03.2010.

(M. Veeraiyan)
Member (Technical)

Ckp.