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

Date 06/09/2010

Appeal No. E/1778/2008 – SM[BR]

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

To :
M/S SPINTECH INC.
20TH MILESTONE, G.T.ROAD, RAI VILLAGE,DISTT.
SONEPAT, HARYANA.
M/S SPINTECH INC. Appellant

Vs

Respondent

C.C.E. ROHTAK

I am directed to transmit herewith a certified copy of **Final order No**. 954 /2010-SM[BR] dated 31.8.2010 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. ROHTAK
   SCO NO,6 SECTOR 1, ROHTAK.
2. Adv. / Consult
   MR.P.C.JAIN
   332, ARAVALI APARTMENTS, ALAKNANDA, NEW DELHI-19
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)

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

West Block No.2, R.K.Puram, New Delhi

COURT-III

Date of hearing:20.7.2010

Date of pronouncement : 31-8-.2010

Central Excise Appeal No.1778 of 2008-SM

Arising out of the order in appeal No.84/KKG/RTK/2008 dated 23.4.2008 passed by the Commissioner (Appeals), Central Excise, Delhi III.

Hon'ble Shri M. Veeraiyan, Technical Member

1	Whether Press Reporter 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 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

M/s Spintech Inc. 20th Milestone
G.T. Road,Rai Village, Distt. Sonepat
Haryana ... Appellants

Present Address:

202-Empire Plaza, Sultanpur,
New Delhi

Vs.

C.C.E., Rohtak ... Respondent

Appearance:

Shri P.C. Jain, Advocate for the appellants
Shri S.K. Bhaskar, Authorized Departmental Representative (DR) for the Revenue

Coram: Hon'ble Shri M. Veeraiyan, Technical Member

Final Oral Order No. 954/2010 SM (BR)

Per M. Veeraiyan:

This is an appeal against the order of the Commissioner (Appeals) No.84/KKG/RTK/2008 dated 23.4.2008 which upheld the De novo order of the original authority No.4/07 dated 19.2.07 which was passed in pursuance of the Tribunal's order of remand in Final Order No.A/110/03-SM dated 28.1.2003.

2. Heard both sides. Learned Advocate also filed written submission dated 2.8.2010.

3.1 The relevant facts, in brief, are that when the officers visited the premises of the appellant on 14.9.98, they found that RG-23 part I was not written upto the date; in respect of polyester tow it was written only up to 31.7.98; in respect of PPSF and polyester top it was written up to 30.6.98; in respect of wool top it was written up to 14.8.98 and in respect of artificial staple fibre top it was written upto 15.8.98. The officers found that inputs on which modvat credit was taken were found short and the duty involved was Rs.2,20,954.70. Shri K.B.Bansal, Production Manager/ Authorised Signatory admitted the shortage but he was unable to explain the reason for shortage except claiming that the same was due to incomplete records. Show cause notice was issued alleging that the inputs were clandestinely cleared in contravention of Rule 57 F(3) of Central Excise Rules, 1944 and proposing demand of duty and proposing penal action.

3.2 The original authority by his order dated 10.3.2000 confirmed the demand as proposed in the show cause notice and imposed penalty of

Rs.10,000/-. On appeal, the Commissioner (Appeals) vide his order dated 19.8.02 upheld the order of the original authority.

3.3 However, the Tribunal vide order dated 28.1.2003 set aside the orders of the authorities below and remanded the matter to the original authority with following observations:-

> *"6. A scrutiny of the Panchnama shows that the documents examined bythe officers included Daily Production report (computerized) in 8 pages and a photocopy of blending register, which were private records maintained by the appellants. The Panchnama also admits that this private record showed blending of various ingredients. It also admits that production was going on in the appellant's factory during the officers' visit. It has been contended by the Counsel for the appellants that the modvatable inputs found short were partly maintained in the production of the day of the officers' visit and partly under processing. It has , therefore, been argued that there was no clandestine removal of the inputs as alleged by the department. According to ld. Counsel , the blending register would indicate the quantities of various inputs captively consumed in the manufacture of final products. Had the private records been properly considered by the authorities below, ld.Counsel submitted, the Department's allegation would have been rejected. In order to substantiate the appellants' case that the inputs in question had been wholly consumed captively in the manufacture of final products, the appellants filed with he lower appellate authority two letters issued by their customers, who , in those letters, certified that they had supplied those inputs in the appellants for the job work of blending etc. and that they received the processed goods against payment of job work charges. It appears that the lower appellate authority did not accept the certificates of the appellants' customers. The Commissioner (Appeals) also observed in the impugned order that the appellants had admitted the shortage and could not explain the reason therefor. This observation appears to be factually incorrect inasmuch as the authorized signatory of the company had clearly stated that the shortage could be due to incomplete records. For these reasons, the impugned order*

cannot be sustained. The order of the adjudicating authority is also equally unsustainable inasmuch as it suffers from the infirmity of non-application of mind to the evidence on record. In the circumstances, this matter is fit to be remanded to the original authority, particularly so since the certificates issued by the appellants' customers were not before the authority when it passed the order of adjudication.

7. Ld. Counsel has relied on a retraction dated 17.9.98 of the authorized signatory of the company, whereby he allegedly retracted the statement given by him on 16.9.98 to the Inspector of Central Excise. A copy of the alleged retraction is seen on record. This does not mean to be bona fide retraction inasmuch as there is no reference to any such retraction in the appellant's reply to the show cause notice. The letter dated 17.9.98 of Shri K.B. Bansal to the Assistant Commissioner of Central Excise, Sonepat will not merit acceptance as bon fide retraction of the appellants. It would follow that the original statement dated 16.9.98 of the authorized signatory would operate as evidence with full force in the case."

3.4 The original authority vide order dated 19.2.2007 confirmed the demand and imposed penalty and the said order of the original authority stands upheld by the Commissioner (Appeals).

4. Learned Advocate for the appellant's, interalia, made the following submissions:-

a) The officers merely checked the raw materials in stock and they have not verified the stock of materials in process and the stock of finished goods. Even though the appellants have not maintained the statutory records up to date, the same is only a technical violation. The statement of the authorized signatory was to the extent that he was not able to explain the shortage. It was obligatory on the part of the officers to check the private records maintained by the appellants which related to the receipt and issue of various inputs. They should have also verified the stock in the shop floor. When the appellants provided the records indicating the issue of allegedly short found inputs, the officers should have accepted the version as there was no allegation that the private records produced by them were false or forged.

b) The Direction of the Tribunal to consider the private records have not been properly appreciated. As the materials have been received on job work basis, the certificates given by them from the supplier of inputs should have been taken into account. The orders of the authorities below have totally mis-read the contents of the private records. If the entries in the private records were appreciated there was no shortage of any input and therefore, the demand is totally unjustified. The penalty should also be set aside.

c) It is evident from Panchnama that there was no variation in stock of finished goods. Had there been clandestine removal of raw materials as alleged, production of finished goods would not have tallied. This is a strong circumstances against allegation of shortage of inputs.

d) There is no evidence brought on record by the Department about removal of inputs from the factory. They have merely drawn an inference from alleged shortages found as a result of defective and incomplete stock taking. This inference is unwarranted in view of the above submissions.

e) Regarding the shortage of 11,887/70 kgs. of polyester tow, he submitted that 3,665 kgs. had been issued on 2.8.98 and

8,227.7 kgs. Had been issued on 14.8.98 but the entries could not be made by the concerned clerk in RG-23 Part I. Further, from the polyester tow, polyester top was being made and there are 6 entries for top manufactured during the period 3.8.98 to 21.8.98 which have been ignored by the adjudicating authority. The Commissioner (Appeals) held the finding of the original authority as reasonable without appreciating that taking figures for part of the period is not conclusive and that polyester tow would be lying on the factory floor awaiting conversion to top. He also submitted the authenticity and correctness of stock register of tow and top conversion cannot be challenged.

f) Regarding shortage of 6,466,98 bags of viscose tops while the adjudicating authority gave benefit for 550 kgs. relying on the blend register, for rests of the lots, he denied on the ground that the blend register did not show the date of commencement of lot. The blend register is not a statutory register and no prescribed format is there and the same was maintained according to the requirement of the appellant.

5. Learned SDR reiterates the finding and reasoning of the Commissioner (Appeals).

6.1 I have carefully considered the submissions from both sides including the written submissions filed by the learned Advocate and also perused the records. The matter is before the Tribunal for the second time having been remanded to the original authority vide order dated 28.1.2003. When the officers visited the premises of the appellants, it was noticed that the entries relating to receipt and issue of various inputs in

RG-23 Part I register were not made for the periods ranging from 1 month and 2 ½ months. As the assessee was availing benefit of cenvat credit, they were under obligation to maintain receipt and issue of the inputs on which credit has been taken. The accountal of the inputs includes the accounting of the disposal of the inputs for the intended purposes. The reason for non-maintenance of accounts given is that the clerk has not entered the same. This is not a responsible explanation. The shortage was ascertained by the officers in presence of Shri K.B. Bansal who has admitted the shortage but claimed that the same was due to incomplete records. Who is responsible for keeping statutory records incomplete? Obviously, the appellants are only responsible.

6.2 The grievance of the appellants are that the shortages ascertained by the officers are not correct as they have not done proper job of stock taking. According to the appellants, the stock taking was highly defective and the stock of inputs lying on the floor was not taken into account and the officers checked only the stock in the godown. In view of failure of the officers to undertake the proper stock taking, according to the appellants, indirect reconciliation became necessary. It was submitted by the them that the blend register and stock register produced by the appellants on 2.2.2000 to be accepted as the same was not held to be forged or genuine. The original authority and Commissioner (Appeals) have gone through the private records and given reasons as to why they could not rely on the same.

The appellants also submitted that they were receiving goods from job workers, and the certificate produced from the job workers in 2002 should also be accepted implicitly as the Tribunal has remanded the matter for considering the certificate given by job workers. The appellants claimed that the authorities below have mis-read the private records. The blend register produced by them not being statutory register could be maintained in any format. Therefore, the original authority should not have disallowed their claim regarding the issue of inputs to the shop floor on the ground that the date of issue of lot for processing and the date of completion were not indicated.

7.1 None of the above submissions on behalf of the appellants are acceptable. The question is not the right of the appellants to maintain the blend register and stock taking (which are private records) in any format they wish. They are entitled to maintain private records in whatever format they wished. In the present case, the appellants have failed in their primary responsibility of maintaining the statutory records relating to receipt and issue of inputs for periods ranging from 1 month and 2 ½ months. In the interest of justice, the appellants have been given an opportunity to prove to the authorities below that the goods found short were properly accounted. In my considered opinion, the appellants have failed to do so. The appellants have not only failed to maintain the statutory records properly but have miserably failed to correlate from the private records that the materials have been utilized for the intended purposes. For example, the claim that they issued 3665 kgs. of polyester tow on 2.8.98 for shop floor looks unbelievable as on other days, the quantities issued were in the range of 1000 kgs. only . Again on 14.8.98, they claimed to have issued much larger quantity of 8,227.7 kgs for processing. The need for issue of such huge quantity within a short interval (as per the stock register produced in 2002) is not convincing.

Unless the entire quantity of 3660 kgs. have been utilized before 14.8, 98, the need for issuing such huge quantity is not known. In view of the above, it is noticed that the appellants have failed to show that the issues were genuine. It is to be noted at the time of visit by the officers, no claim has been made about the private records like the blend register, stock register maintained by them which were produced only in 2002.

7.2 The submission of the appellants that the officers have conducted stock taking in highly defective manner does not merit consideration. Where the appellants have failed to maintain records for several months, the burden cannot be shifted to the officers to search the private records maintained by the appellants and reconcile indirectly and laboriously to find evidence in support of the claim made by the appellants. If such a view is taken, it can allow unscrupulous person not to maintain any statutory records and put the blame on the officers in not conducting and reconciling some private records maintained by the assessee.

7.3 In other words, what is to be considered is whether the appellants have explained the shortage as admitted by the production manager/authorized signatory on the date of visit of officers on 14.9.98. In my considered opinion, the appellants have failed to account for the shortage in spite of having been given an opportunity by the Tribunal by way of remand vide order dated 28.1.2003.

8. The matter was remanded by the Tribunal stating that the shortage can be due to incomplete records and therefore, the authorities were directed to consider the submissions including private records and the certificate from the job workers. This has been considered and not found to be satisfactorily explaining the shortage. As the appellants have

failed to account for the shortage of inputs on which modvat credit has been taken, the duty demand has to be sustained.

9. However, the submissions of the appellants that the Department has not adduced any evidence of clandestine removal of the inputs is found to be correct. While the demand of duty on short found inputs on which credit had been taken has to be upheld as the shortage was not explained, there is evidence of clandestine removal of said inputs. The charge of clandestine removal being a serious charge requires some corroboration and in the present case, there is no such corroboration. It is clearly a case of improper maintenance of accounts which is established. However, it is noticed that the penalty imposed is only nominal and the same is justified.

10. The other submissions on behalf of the appellants are not found to be devoid of merits.

11. In view of the above, the order of the Commissioner (Appeals) is upheld. The appeal is, therefore, rejected.

(Pronounced in the open Court on 31-8-.2010)

(M. Veeraiyan)
Technical Member

scd/