

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/271 /2009 – SM[BR]

Date 18/10/2010

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

To :
M/S RICO AUTO INDS. LTD.
38 K.M.STONE, DELHI-JAIPUR HIGHWAY GURGAON.
M/S RICO AUTO INDS. LTD.

Appellant

Vs
Respondent

C.C.E. DELHI III

I am directed to transmit herewith a certified copy of Final order No. 1114 / 2010 –SM[BR] dated 29.9.2010
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

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1610, SECTOR-4, URBAN ESTATE, GURGAON-122001

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 Publications 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 (Harvana)

13 TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor, Vasant Arcade, Nelson Mandela Road, Vasant Kunj, New Delhi - 110070

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15 Guard file


Assistant Registrar
(SM Appeal Branch)

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No.2, R. K. Puram, New Delhi.

Date of hearing/decision 29.09.2010

For approval and signature:

Hon'ble Shri Justice R.M.S. Khandeparkar, President

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?	See
4	Whether Order is to be circulated to the Departmental authorities?	Yes

Excise Appeal No. 271 of 2009-SM

[Arising out of order-in-appeal No. 239/ANS/GGN/2008 dated 24.10.2008 passed by the Commissioner of Central Excise (Appeals) Gurgaon]

M/s Rico Auto Industries Limited

Appellant

Vs.

CCE, Delhi-III, Gurgaon

Respondent

Appearance:

Rep. by Sh. Ram Chander Choudhary, Advocate for the Appellants.

Rep. by Sh. S.K. Bhaskar, DR for the respondent.

Coram: Hon'ble Sh. Justice R.M.S. Khandeparkar, President

FINAL ORDER NO. 1114/2010 SM (BY)

Per: Justice Sh. R.M.S. Khandeparkar:

Heard the learned Advocate for the appellants and DR for the respondent.

2. This appeal arises from order dated 24.10.2008 passed by the Commissioner (Appeals) Gurgaon. By the impugned order, the appeal filed by the appellants against the order of the original authority has been dismissed. The Assistant Commissioner, Gurgaon by his order dated 29.02.2008 had confirmed the demand for recovery of sum of Rs.1,28,798/- against the appellants alongwith interest thereon and equal amount of penalty. The appellants are engaged in manufacture of excisable goods classifiable under chapter 87 of the Central Excise Tariff Act, 1985. They are registered with the Central Excise Department and avail cenvat credit facility. In the course of the audit of the records of the appellants, it was observed by the department that the appellants had received an amount of Rs.7,89,210/- as insurance amount on the quantity of excisable goods cleared for export and lost in transit, a show cause notice dated 23.08.2007 came to be issued for necessary action for recovery of the said amount of Rs. 1,28,798/-. The proceedings initiated pursuant to the issuance of the said show cause notice were contested by the appellants. However, the original authority confirmed the demand and imposed the penalty. The appeal against the same did not yield any fruitful result to the appellants, hence the present appeal.

3. It was the case of the department that in the course of the audit of the financial records of the appellants, it came to the knowledge of the department that the amount of Rs. 7,89,210/- was received by the appellants as insurance amount for lost materials out of the quantity of excisable goods which were sought to be exported. The goods were cleared under the bond but were never exported on the ground of loss thereof in transit and there was recovery of the value thereof from the insurance company.

It was the defence of the appellants that they had cleared the excisable goods for export under the bond as per the provisions of Rule 19 of the Central Excise Rules, 2002 read with the relevant notification issued thereunder and it fulfilled all the conditions and the procedure prescribed for such export under the bond. The goods were duly cleared by the customs and the endorsement for such clearance was made on the relevant ARE-1 by the Customs authorities at the time of clearance. All the relevant documents were submitted to the jurisdictional divisional office as proof of export. Any loss of goods in transit after following the prescribed condition and procedure is beyond the control of the appellants and, therefore, the appellants are not liable to pay any duty in relation to the lost goods. As already observed above, neither the adjudicating authority accepted the contention on behalf of the appellants nor the lower appellate authority.

5. While assailing the impugned order, the learned Advocate for the appellants submitted that the lower authorities wrongly interpreted the provision of Rule 19 of the said Rules. The appellants had furnished all the documents which were required to be furnished to establish the export. The proof of export is clearly available in terms of the endorsement on those documents by the excise authorities and further stand corroborated by shipping bill and bill of lading. Reliance is placed in the decision of the Tribunal in the matter of **CCE, Coimbatore vs. Sree Narasimha Textiles Ltd.** reported in 2009 (239) ELT 86 (Tri-Chennai). It was further submitted that there was no suppression of any fact or willful disobedient or malafide intention to evade duty on the part of the appellants and hence there was no justification for imposition of penalty.

On the other hand, DR placing reliance in the decision of the Larger Bench of the Tribunal in the matter of **Gupta Metal Sheets vs. CCE, Gurgaon** reported in 2008 (232) ELT 796 (Tri. LB) and of the Single Member of the Tribunal in **S.V.G. Exports (P) Ltd., vs. CCE, Chennai-III** reported in 2008 (232) ELT 305 (Tri. Chennai), submitted that the law clearly required the appellants to pay the duty unless the factum of export is clearly established. In the case in hand, concurrent findings are to the effect that there was no such voluntary disclosure by the appellants about the export of the goods. He further submitted that theft of goods does not amount to loss of goods within the meaning of the said expression under the statutory provisions comprised under the excise statute.

7. The facts that the goods were sought to be cleared for export under bond and in that regard there was compliance of Rule 19 of the Central Excise Rules, 2002 are not in dispute. The first point of dispute relates to the absence of proof of actual export of the goods. While it is the contention of the appellants that the documents in the form of ARE-I, bill of lading and shipping bill sufficiently established the same and that it stands corroborated by the undisputed fact that on account of loss of goods, the appellants had received the insurance amount. On the other hand, it is the case on behalf of the department that the said documents by themselves do not establish the factum of actual export of the goods and in the absence of the proof of actual export, the appellants are liable to pay the duty.

8. It is undisputed fact that the documents which are prepared in the form of ARE-I, bill of lading and shipping bill the copies of which are placed on record at pages 26, 27 and 28 respectively of the paper book, were prepared for the purpose of compliance of Rule 19 of the Central Excise

Rules, 2002. Evidently all those documents were prepared at the time of clearance of the goods for export. In other words, all those documents were prepared at the time when goods continued to be within the territorial limits of the country. None of these documents on the face of it would disclose the goods have been actually exported, nor would disclose the goods having left the territorial limits of the country.

9. Clause 13.6 of the notification issued in relation to the procedure and condition for export to all the countries except Nepal and Bhutan being Notification No. 42/2001-CE (N.T.) dated 26.06.2001, provides as under:

“13.6. In case of non-export within six months from the date of clearance for export (or such extended period, if any, as may be permitted by the Deputy/Assistant Commissioner of Central Excise or the bond-accepting authority) or any discrepancy, the exporter shall himself deposit the excise duties along with interest on his own immediately on completion of the statutory time period or within ten days of the Memorandum given to him by the Range/ Division office or the Office of the bond-accepting authority. Otherwise necessary action can be initiated to recover the excise duties along with interest and fine/ penalty. Failing this, the amount shall be recovered from the manufacturer-exporter along with interest in terms of the Letter of Undertaking furnished by the manufacturer. In case where the exporter has furnished bond, the said bond shall be enforced and proceedings to recover duty and interest shall be initiated against the exporter”.

10. Plain reading of the above provision would disclose that mere preparation of the documents at or around the time of clearance of the goods for export by itself will not establish the factum of export of the goods and in spite of preparation of lost documents, if party actually fails to export the product within six months from the date of the clearance of the goods, it is obligatory for the party to deposit the excise duty along with interest on his own, failing which necessary proceedings for recovery thereof can lay. This apparently discloses that the documents which are referred to in Rule 19 by themselves do not establish the factum of export. They are merely to enable

the party to export the goods lawfully. The documents which are necessary for lawful export would not apparently establish the factum of export. Being so, the documents in the nature of ARE-I, bill of lading and shipping bill prepared prior to the actual export of the goods cannot be sufficient to establish the factum of export.

11. Undisputedly, the appellants are unaware of the place where the goods were allegedly stolen, and the loss is stated to be on account of the goods were stolen. No documents in relation to the insurance claim satisfaction has been placed on record. Admittedly, no FIR was lodged by the appellants. It was sought to be contended that the appellants came to know about the loss of goods only from the persons who were suppose to receive the goods in foreign country. However, no document in that regard has been placed nor even the date regarding receipt of such information from the foreign country has been disclosed. The identity of the person who might have transmitted the alleged information has also not been disclosed. In other words, even if the department wanted to make enquiry in that regard, the basic facts necessary for such enquiry were not disclosed by the appellants.

12. Records therefore disclose that the appellants have failed to establish that the goods were actually exported beyond the territory of India. Obviously, the provisions of law requiring the appellants to pay the duty with interest were attracted.

13. It is, however, the contention on behalf of the appellants that the goods were cleared on 09.12.2005 whereas the show cause notice was issued on 23.08.2007. Being so, the claim was barred by limitation and there was

no case for invocation for extended period of limitation. The contention is devoid of substance. The show cause notice clearly discloses the fact that appellants had failed to export the goods which were sought to be cleared for export under the bond was revealed to the department pursuant to the scrutiny of the financial records of the appellants by the audit party and thereupon the necessary show cause notice was issued. The fact that failure on the part of the appellants to export the goods inspite of getting them cleared for export under the bond came to the knowledge of the department only pursuant to the scrutiny of the appellant's financial records by the audit was neither disputed nor denied by the appellants in the reply to the show cause notice. It is also pertinent to note that there was specific assertion in the show cause notice that in the above circumstances there was willful suppression of the said fact by the appellants with intent to evade the duty and therefore extended period was invokable. In response, only contention that was raised was that the goods were lost in transit and, therefore, there was no obligation to pay the duty. Being so, there was a clear case for invocation of extended period of limitation.

14. The Larger Bench of the Tribunal in **Gupta Metal Sheets** had cleared ruled thus:-

“8. From a bare reading it would appear that **remission** can be claimed with respect to excisable goods which are lost or destroyed by natural causes or in some unavoidable accident. The term ‘loss’ cannot be understood in the limited sense of loss to the manufacturer. In the context of the Central Excise Law, it has to be understood as being unavailable for consumption in the market. We find substance in the submission of the Jt. CDR that in the case of theft or dacoity, the goods are not ‘lost’ or ‘destroyed’; they rather enter the market for consumption, albeit stealthily, after being removed from the approved premises or the place of storage. The submission is in accord with Section 5 of the Central Excise Act in terms of which **remission** can be allowed when the goods are found to be “deficient in quantity”. Such deficiency in quantity may occur on account of loss or destruction. However, read with the rule, it must be attributable to

any natural cause or unavoidable accident. 'Natural cause' has to be understood in the sense of some natural phenomenon i.e. vagary of nature or some act of nature like fire, flood or a similar natural calamity. Besides, goods like molasses may also lose in quantity while in storage for environmental reasons. The act of forcibly removing the goods by any means – non-violent or violent – amounting to theft or dacoity under the Indian Penal Code cannot be said to be a natural cause. 'Theft' has been defined in the Indian Penal Code to mean dishonestly taking of any moveable property out of the possession of any person without his consent. Theft is robbery if, in order to the committing of the theft, or in committing the theft, or in carrying away or attempting to carry away property obtained by the theft, the offender voluntarily causes or attempts to cause to any person death or hurt or wrongful restraint, or fear of instant death or of instant hurt, or of instant wrongful restraint. When five or more persons conjointly commit or attempt to commit a robbery, they are said to commit dacoity. It would thus appear that 'theft' or 'dacoity' involves forcible removal of goods by non-violent or violent means, as the case may be and this cannot be said to be a natural cause.

9. The case of the appellant is that theft or dacoity is covered by the expression 'unavoidable accident'. Theft or dacoity, in our opinion, is an incident and not an accident, much less unavoidable. Accidents take place due to one's carelessness or negligence and it cannot be said to be unavoidable. As per the dictionary meaning, 'accident' means, an event without apparent cause, an unfortunate event, especially, one causing physical harm or damage, brought about unintentionally; occurring of things by chance (see Concise Oxford Dictionary, Ninth Edition). Theft and dacoity are committed by a design and they cannot be said to be accident by any logic. By taking due care and caution they can be avoided and, therefore, it cannot be said that theft or dacoity is 'unavoidable accident'."

15. The decision clearly holds that theft does not amount of loss within the meaning of the said expression for the purpose of avoiding the duty liability in relation to the goods which are sought to be cleared for export under a bond and yet the party fails to export the same.

16. It has also been held by the Tribunal in **S.V.G. Exports** case that-

"4. I have carefully considered the facts of the case and the rival submissions. The impugned order sustained demand of duty due on goods cleared for export but were involved in accident and were damaged. As the impugned goods were not exported in terms of the bond executed by the appellants, they are required to discharge the duty due on those goods. The duty liability on the impugned goods could be waived only if there are enabling provisions in the statute. Rule 21 of Central Excise Rules, 2002 which provides for **remission**

of goods destroyed in accidents is subject to the condition that the damage is suffered by the excisable goods before their removal from the factory. In the instant case, the goods have been damaged after they were cleared for export and outside the factory. There are no provisions enabling authorities to remit duty on such goods. I find that the Tribunal in the case of Hind Nippon Rural Industries (P) Ltd. case (supra), had held that there is no provision for **remission** of the duty once goods have been cleared from the factory. The Tribunal, in the case of Siraj Sons, Bombay v. Collector of Central Excise, Bombay-I reported in 1988 (35) ELT 597 (Tri.) has held that waiver of duty is not claimable if goods are destroyed by fire after clearance and before export. The ratio of the Tribunal's decisions are to the effect that duty is liable to be paid by the assessee in respect of goods cleared for export and destroyed before export. Respectfully following the above ratio, I find that the appeals to be devoid of merit. Therefore, the appeals are dismissed".

17. The decision of the Division Bench of the Tribunal in **Shree Narasimha Textiles** case was delivered in the absence of the decision of the Larger Bench of the Tribunal in **Gupta Metal Sheets** being brought to the notice of the Division Bench. Obviously, therefore, the ruling cannot be binding, rather being not in consonance with the law laid down by the Larger Bench, cannot be binding

18. For the reasons stated above, therefore, the appeal fails and is hereby dismissed.

[Justice R.M.S. Khandeparkar]
President

/Pant/