

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066
EXCISE APPEAL BRANCH

Appeal No. E/783 /2002,785 /2002-786 /2002 - EX[DB]
E/787,788,789&790/2002-EX

Date 05/02/2010

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

To :
ASHIRVAD ISPAT UDYOG
URLA INDUSTRIAL AREA COMPLEX,
RAIPUR
ASIRVAD ISPAT UDYOG

← 21. SH. BASANT SHRIVASTAVA, (
22. SH. VIJAY BOTHARA
23. M/S. ASHIRVAD ISPAT (RYP) PVT. LTD.,

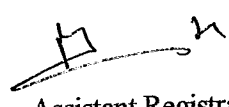
Appellant

Vs
Respondent

C.C.E. RAIPUR

2010 EX[DB] dated 02-12-2009

I am directed to transmit herewith a certified copy of Final order No. 34-41/
passed by the Tribunal under Section 35-C(1) of Central Excises Act, 1944


Assistant Registrar
(Excise Appeal Branch)

Copy to :

1. Respondent

C.C.E. RAIPUR

CENTRAL EXCISE BUILDING, DHAMTARI ROAD, TIKRAPARA, RAIPUR 492001.

2. Adv. / Consult SH. S. VYAS, ADV.,
P-13, SECTOR-12
NOIDA-201301

2. SH. SUSHIL KUMAR, CA.
2/1, 2ND FLOOR, ABOVE APARAJITA,
AKASHGANGA, BHILAI

3 C.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 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 Kuni, 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

18. HON'BLE PRESIDENT

19. SH. VIJAY CHAND BOTHARA

← M/S. ASHIRVAD ISPAT (RYP) PVT. LTD.
URLA INDUSTRIAL AREA COMPLEX, RAIPUR

20. SH. JITENDRA KUMAR BOTHARA,


Assistant Registrar
(Excise Appeal Branch)

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

Date of hearing: 02.12.2009

Date of decision: 02.12.2009

For approval and signature:

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

Hon'ble Shri Rakesh Kumar, Member (Technical)s

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?	No
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 Nos. 783, 784, 785 & 786 of 2002

[Arising out of order in original No. 720/CH:72/Commr/2001 dated 13.12.2001 passed by the Commissioner, Central Excise & Customs, Raipur]

M/s Ashirwad Ispat Udyog
Basant Shrivastava
Vijay Bothara
M/s Ashirwad Ispat (RYP) Pvt. Ltd.,

Appellants

Vs.

CCE, Raipur

Respondent

AND

Excise Appeal Nos. 787, 788, 789 & 790 of 2002

[Arising out of order in original No. 721/Mod/Commr/2001 dated 12.12.2001 passed by the Commissioner, Central Excise & Customs, Raipur].

Vijay Chand Bothra
Jitendra Kumar Bothra
M/s Ashirwad Ispat (RYP) Pvt. Ltd.,
Basant Shrivastava

Appellants

Vs.

CCE, Raipur

Respondent

Appearance:

Appeared for the Appellants – Shri Sekhar Vyas, Advocate with Shri Jeevesh Mehta and Shri Sushil Kumar, C.A.

Appeared for the Respondents – Shri V. Choudhary, SDR

Coram: Hon'ble Shri Justice R.M.S. Khandeparkar, President
Hon'ble Shri Rakesh Kumar, Member (Technical)

FINAL Oral Order No. 34-41/2010-EX

Per Shri Justice R.M.S. Khandeparkar:

Heard at length the learned Advocate for the appellants and learned DR for the respondent. Since common questions of law and facts arise in all these appeals, they were heard together and are being disposed of by this common order.

2. The Appeal Nos. E/783 to 786/02 are against the order dated 15.11.2001 passed in relation to the show cause notice issued on 28.2.96 to the appellants M/s Ashirwad Ispat Udyog, Shri Basant Shrivastava, Shri Vijay Bothara, & M/s Ashirwad Ispat (RYP) Pvt. Ltd., whereupon the order No. 720/CH:72/Cmmr/2001 came to be passed by the Commissioner, Raipur. The Appeal Nos. E/787 to 790/02 arise from order No.

721/Mod/Commr/2001 dated 15.11.2001 in relation to the show cause notice dated 7.2.96 which was issued to the appellants M/s Ashirwad Ispat (RYP) Pvt. Ltd., Shri Vijay Chand Bothra, Jitendra Kumar Bothra, Shri Basant Shrivastava and M/s Ganpati Industrial Corporation.

3. Under the first order, the excisable goods of 1030 MT valued at Rs. 1,03,00,000/- have been ordered to be confiscated while giving option to get the said goods redeemed on payment of redemption fine of Rs. 10,00,000/- as also has imposed penalty of Rs. 3,00,000/- under Section 173Q read with Rule 226 of the Central Excise Rules 1944, besides the penalty of Rs. 1,00,000/- under Rule 226 of the Central Excise Rules 1944 and also penalty of Rs. 8,01,546/- under Section 11AC of the Central Excise Act, 1944, and has also ordered payment of interest. There is further penalty of Rs. 1 lakh on the appellants Shri Vijay Chand alias Vijay Kumar Bothra and Rs. 1 lakh against Shri Vasant Shrivastava. Modvat credit amounting to Rs. 4,69,855/- had been recovered in cash from the appellants M/s Ashirwad Ispat (RYP) Pvt. Ltd., and they have been subjected to penalty amounting to Rs. 4,69,855/- besides payment of interest.

4. Under second order MS Square weighing 1.830 MT, MS Flat weighing 11.400 MT, waste and scrap weighing 37,870 MT totalling to 51.100 MT of finished excisable goods valued at Rs. 3,66,135/- have been ordered to be confiscated, with option to get the goods redeemed on payment of fine of Rs. 80,000/- and has confirmed the demand of Rs. 3,73,231/- in relation to the raw materials (inputs), demand of Rs. 11,76,301/- in relation to 699.204 MT of finished excisable goods which were cleared without payment of duty and has imposed penalty of Rs. 2,00,000/- under Rule 173Q

read with Rule 226 of the said rules, penalty of Rs. 1,00,000/- under Rule 226 of the said rules, penalty of Rs. 1 lakh under Rule 52A of the said rules and penalty of Rs.15,42,532/- under Section 11AC of the said Act and ordered payment of interest by the appellants M/s Ashirwad Ispat (RYP) Pvt. Ltd., and imposed penalty of Rs. 1 lakh each against appellants Sh. Vijay Chand Bothra, Sh. Jitendra Kumar Bothra and Shri Basant Srivastava while dropping the proceedings against the noticee M/s Ganapati Industrial Corporation.

5. The facts in brief relevant for the decision are that pursuant to interception of two trucks by Nagpur Commissionerate on 29.08.95 transporting certain finished goods manufactured by the appellants M/s Ashirwad Ispat (RYP) Pvt. Ltd., it is stated to have been revealed that the goods were transported from the premises of M/s Ashirwad Ispat Udyog. The intimation in that regard being received by the Raipur Commissionerate, the investigation was conducted and above referred show cause notices came to be issued to the concern parties. On receipt of the show cause notices, the appellants demanded the list of the records and documents which were relied upon in the show cause notice, the inspection of such records and documents and permission to take extract and photocopy thereof, return of the records which were seized from their premises in the course of investigation and three months time to file the reply after compliance of the request regarding the copy of the list of documents and return of documents to them. A letter requesting the same was forwarded to the Commissionerate on the first date of hearing i.e. 31.05.96. It appears that thereafter certain copies of documents were furnished to the appellants, however, the appellants did not file any reply but insisted for return of all the seized documents by referring

to the Circular No. 42/88-CX dated 24.05.88. It appears that repeatedly letters were sent in that regard to the Commissionerate. Learned Commissioner however, on account of failure on the part of the appellants to file the reply on the basis of the records available before him passed the impugned orders as stated above.

6. Learned Advocate for the appellants while drawing our attention to the letters which were written by the appellants to the Commissionerate prior to issuance of show cause notices as well as after issuance of show cause notices and placing reliance in the decision in the matter of **Novamet Industries vs. Union of India** reported in 2008 (227) ELT 363 (All.), **Cona Inds vs. CCE, Mumbai** reported in 2005 (190) ELT 208 (Tri., Mumbai), **Methodex Systems Ltd., vs. Union of India** reported in 2001 (127) ELT 44 (M.P.), **A.J. Cast Alloys P. Ltd. vs. Commr. of Cus. (Airport & Admn.) Kolkata** reported in 2008 (230) ELT 518 (Tri. -Kolkata) submitted that the learned Commissioner clearly erred in denying the opportunity to the appellants to meet the case of the department by not furnishing the copies of the relevant documents annexed to the show cause notice as well as by not returning the unrelied documents which were seized in the course of the investigation in the matter. He further submitted that the circular issued by the Board clearly required the department to return the unrelied documents and inspite of that the department failed to comply with the mandate of the said Circular and thereby denied the opportunity to the appellants to putforth their effective defence to the charges levelled against them under the show cause notices in question. He further submitted that merely because the appellants had not submitted the list of the documents which were not furnished to the appellants that would not entitle the department to deny fair

opportunity to the assessee to meet the case put forth against him by the department. Failure on the part of the authorities to comply with the said requirements has resulted in denial of principles of natural justice and on that count itself the impugned orders are liable to be set aside and matters to be remanded to the Commissioner to give proper opportunity to the appellants to meet the case of the respondent. He further submitted that the appellants are ready and willing to deposit, without prejudice to their rights, the entire amount of duty alongwith interest accrued thereon upto the date of passing of the impugned order with the respondent in order to show their bonafide in the matter.

7. Learned DR on the other hand, submitted that the show cause notices issued to the appellants alongwith copies of the documents referred to therein clearly disclosed that the appellants M/s Ashirvad Ispat (RYP) Private Limited had cleared various finished goods without payment of duty and in that process the dealers of the said company namely M/s Ashirwad Ispat Udyog had clearly acted in connivance with the said company to evade the duty liability. Various documents which were clearly referred to in the show cause notices and copies of which were given to the appellants lend clear support to the said charge of clandestine removal of the finished goods as well as undervaluation of the goods cleared by the appellants during the relevant period. As regards the non compliance of principles of natural justice, learned DR submitted that the learned Commissioner has dealt with this aspect in para 12 of the impugned order wherein he has clearly observed that sufficient opportunity was given to the appellants to identify the documents, copies of which were required for preparation of their reply. However, inspite of the fact that sufficient time was granted in that regard,

the appellants did not furnish the necessary details and hence in the facts of the case, according to the respondent, it cannot be said that there was any failure on the part of the respondents to comply with the requirements of principles of natural justice.

8. Learned Advocate for the appellants has contended that the authority could not have imposed penalty under Section 11AC of the said Act as the provision of law comprised under Section 11AC came into force w.e.f. 28.09.96 and the relevant periods in the case in hand relate to 1994-95 and 1995-96 which were prior to the date of enforcement of Section 11AC and in that regard attention is sought to be drawn to the decision in the matter of **Cody Teck Ltd., vs. CC, Chennai** reported in 2007 (212) ELT 428. It is, however, submitted on behalf of the respondent that the penalty could have been imposed even under Rule 173Q of the said Rules.

9. As regards the contention regarding failure on the part of the adjudicating authority to furnish the copies of documents and non return of unrelayed documents, the learned Commissioner in the impugned order has observed that the copies of the documents which were relied upon in the show cause notices were supplied to the appellants by 6th March 1996. As regards the other documents which were asked for, the Commissioner has observed that in spite of opportunity being given to identify such documents, the appellants failed to avail such opportunity and did not furnish any information in that regard till the disposal of the matter.

10. The records placed before us undoubtedly disclose a copy of the letter dated 31.05.96 addressed by the appellants M/s Ashirwad Ispat (RYP) Ltd., to the Commissioner, Raipur requiring him to furnish a list of records and

documents which were relied upon in the show cause notice, liberty to inspect the records and documents and to take extract or photocopies thereof, return of all the records/ files/ documents which were seized/withdrawn from the appellants and not relied upon in the show cause notice as well as for three months' time to file the necessary reply. Undoubtedly, the letter does not specifically refer to any particular document as such of which copies were expected. The letter merely stated that the appellants required copies of the documents relied upon in the show cause notice in order to prepare their defence. The letter also discloses reference to the documents which were seized from the premises of the appellants, and need for return thereof.

11. One of the subsequent letter dated 07.04.97 by the appellants to the Commissioner clearly makes reference to the Board Circular No. 42/88 CX.6 dated 24.05.88 which provided that "whenever any document or records are seized by the department, immediate efforts to be made to segregate the documents which are proposed to be relied upon in framing/ establishing charge and once the show cause notice is issued to the party, the documents/ records which have not been relied upon may be returned under proper receipt".

12. Undoubtedly, the Board circular is binding upon the department. At the same time, it is equally true that a circular nowhere provides that the return of the documents not relied upon is a must for the proceedings relating to a show cause notice. It merely states that having segregated the documents which are required in support of the charge from those which are not required, the latter type of documents may be returned to the party particularly once the show cause notice is issued. At the same time, it

cannot be disputed that the documents which are seized from the party belongs to the party and department cannot have absolute right to retain such documents unless they are related to any offence or required for any investigation or enquiry by the department. In the case in hand, it is nobody's case that the documents which were seized from the appellants were required for further investigation or enquiry by the department. Being so, we fail to understand the logic behind retaining the documents of the appellants by the department and insisting for identification of only those documents which were required by the appellants for preparing their defence. Once it cannot be disputed that the documents belong to the party and there is no justifiable reason for retention thereof with the department, it would be appropriate for the department to return such documents to the party. Undoubtedly, there is failure in that regard on the part of the department in the case in hand.

13. It is to be also noted that every such failure on the part of the department cannot be made a ground to assail the order relating to duty liability passed by the adjudicating authority and that too after giving proper opportunity to defend the case. Whether the retention of such documents has caused prejudice to the party in preparing his defence or not will depend upon the facts of each case and unless prejudice is made out, it cannot be said that mere failure on the part of the department to return the unrelayed documents would be a ground for quashing the order passed by the adjudicating authority. It would all depend on facts of each case.

14. In the case in hand, undoubtedly the appellants had been insisting, even prior to issuance of show cause notices, for return of their documents seized by the department. After scrutiny of the documents, the department issued show cause notices to the appellants. In the show cause notices the department had specifically referred to certain documents. Obviously, therefore, other documents were of no relevancy to the department. At least no case in that regard has been made before us. Being so, once the documents exclusively belong to the appellants and they were not required by the department, there was no justification for retention thereof by the department.

15. As rightly submitted by the learned Advocate for the appellants that there are certain points like issue of undervaluation, alleged clandestine removal of finished goods, shortage of inputs, in respect of which various allegations have been made against the assessee. While dealing with such charges obviously the statutory documents maintained by them could give necessary information. Admittedly, all such statutory documents in relation to the relevant period were seized by the department during the process of investigation. The appellants were insisting for return of those documents to them in order to prepare their defence. Obviously, in the facts of the case those documents were relevant for the assessees to prepare their defence. Being so, there is a case of prejudice clearly made out by the appellants in the matter in hand and the same would vitiate the order passed by the lower authority.

16. We accept the statement on behalf of the appellants expressing their willingness to deposit the amount of duty alongwith interest calculated upto the date of this order, without prejudice to their rights, for allowing the adjudicating authority to reconsider the matter afresh after giving the opportunity to the appellants to putforth their defence after perusal of the documents.

17. In the circumstances and taking into consideration the decisions sought to be relied upon and facts of the case, we accept the statement on behalf of the appellants and we direct the appellants to deposit the amount of duty alongwith interest accrued upto the date of passing of this order within four months, needless to say that the appellants would be entitled to deduct the amount already deposited from the amount so calculated which is required to be deposited. In case of failure on the part of the appellants to deposit the required amount within the period prescribed under this order, needless to say that the consequences as contemplated hereunder will follow.

18. As rightly submitted by the learned Advocate for the appellants, the question of imposition of penalty under Section 11AC of the said Act cannot arise as the period in respect of which the duty liability is to be calculated relates to the date prior to the enforcement of Section 11AC.

19. In the result, the appeals succeed, the impugned orders are hereby set aside. Matter is remanded to decide the same afresh after returning the seized documents and giving opportunity to the appellants to putforth their defence. Considering the fact that the matter relates to the period 1994-95, 1995-96, we hope that the appellants would cooperate with the concern authority for disposing of the matter expeditiously and the Commissioner

thereafter upon hearing the parties shall dispose of the matter as expeditiously as possible and in any case prior to 30.12.2010. As already observed above in case of failure on the part of the appellants to deposit the balance amount of duty as stated above within the period specified, the appeals shall stand dismissed automatically without being referred to the Tribunal.

[Justice R.M.S. Khandeparkar]
President

[Rakesh Kumar]
Member [Technical]

/Pant/