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

EXCISE APPEAL BRANCH

Appeal No. E/148 /2005,216 /2005 - EX[DB] Date 26/11/2010

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

To :
C.C.E.CHANDIGARH

C.R.BUILDING SECTOR-17-C,
CHANDIGARH PUNJAB
C.C.E.CHANDIGARH Appellant

Vs

M/S SAGR STEEL, Respondent

I am directed to transmit herewith a certified copy of **Final order No. 801-802 2010 EX[DB]** dated 02.11.2010 passed by the Tribunal under Section 35-C(1)of Central Excises Act, 1944

Assistant Registrar
(Excise Appeal Branch)

Copy to :

1. Respondent
   M/S SAGR STEEL,
   G.T.ROAD MANDI GOBINDGARH
2. Adv. / Consult
   MR.BIPIN GARG,ADV.
   B-1/1289,A-VASANT KUNJ, NEW DELHI-70
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
16. HON'BLE PRESIDENT
17. M/S SAGGAR STEELS
    G.T.ROAD SIRBIND SIDE MANDI GOBINDGARH

Assistant Registrar
(Excise Appeal Branch)

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

Date of hearing/decision 02.11.2010

For approval and signature:

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

Excise Appeal No. 148 of 2005

[Arising out of Order-in-Appeal No. 696/CE/CHD/04 dated 21.10.2004 passed by the Commissioner (Appeals) Customs & Central Excise, Chandigarh].

CCE, Chandigarh — Appellants
[Rep. by Sh. Nitin Anand, DR]

Vs.

M/s Sagar Steel — Respondent
[Rep. by Sh. Bipin Garg, Advocate]

AND

Excise Appeal No. 216 of 2005

[Arising out of Order-in-Appeal No. 696/CE/CHD/04 dated 21.10.2004 passed by the Commissioner (Appeals) Customs & Central Excise, Chandigarh].

M/s Sagar Steel — Appellants
[Rep. by Sh. Bipin Garg, Advocate]

Vs.

CCE, Chandigarh — Respondent
[Rep. by Sh. Nitin Anand, DR]

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

FINAL Oral Order No. 801-802/10-EX

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

Heard the DR for the department and learned Advocate for the assessees.

2. Both these appeals arise from same order and, therefore, were heard together and are being disposed of by this common order.

3. The assessees are manufacturers of steel ingots classifiable under sub-heading 7206.90 of the Central Excise Tariff Act, 1985. They were availing the facility of paying central excise duty on fortnightly basis in respect of goods removed from their factory as per Rule 8 of the Central Excise Rules, 2002 for the period December 2002 and January 2003. Pursuant to the scrutiny of ER-1 returns submitted by the assessees for the said months, it was revealed that the assessees had not discharged the duty liability for the second fortnight of December 2002 and January 2003 which they were required to discharge by 5th of January and 5th of February respectively. The total central excise duty so defaulted was Rs. 10,30,959/-, out of which some of Rs. 8,22,270/- pertain to December, 2002 and the balance pertain to January 2003. In fact, the said amount was not paid to the Government, though it was collected by the assessees from their buyers. On that ground, a show cause notice dated 30.12.2003 came to be issued to the assessee, which was contested by the assessees.

4. It is the case of the assessee that on account of deterioration of the financial condition of the assesee they had to put their mill for sale and it was accordingly sold. The required amount of duty was deposited by them

on 9.3.2004 and also an amount of Rs. 1,80,796/- was also deposited on 18.03.2004 towards the interest payable on the said amount. Since the duty amount had already been paid with interest, there could not be imposition of the penalty.

5. The adjudicating authority by its order dated 21.05.2004 rejected the contentions sought to be raised on behalf of the assessee and confirmed the demand for Rs. 10,30,959/- and appropriated the same as it was already deposited. The adjudicating authority also imposed equal amount of penalty under Rule 25 of the said rules.

6. Being aggrieved by the said order, the matter was carried in appeal by the assessee before the Commissioner (Appeals) which came to be disposed of by the impugned order dated 21.10.2004. By the impugned order, the Commissioner (Appeals) reduced the penalty to Rs. 10,000/- while holding that the assessee had started their business w.e.f. 01.04.2004 and they were neither aware nor responsible for any delay in payment of duty for the period prior to that and as such higher penalty could not have been imposed, besides that duty alongwith interest was deposited in March 2004 after issue of the show cause notice.

7. In the appeal filed by the assessee, the impugned order is sought to be challenged in relation to the imposition of penalty on two grounds namely that in the show cause notice there was no specific mention of any of the clauses of Rule 25 so as to justify the penalty under the said Rule and secondly that there was no intention to evade the duty and the same is apparent from the fact that the entire amount with the interest was paid immediately after issue of the show cause notice. The learned Advocate for the appellants submitted that considering the provisions of Rule 8(3)(4) of the Central Excise Rules, 2002 as were in force at the relevant time did not

justify imposition of the penalty in the facts of the case. Further, referring to Rule 25 of the said Rules, the learned Advocate submitted that the same comprises of four different situations wherein the penalty can be imposed and it was necessary for the department to disclose under what clause of Rule 25, that they were intending to impose the penalty and in the absence thereof the authorities below would not have been imposed the penalty. If at all, any default is said to be committed, the penalty could have been at the most under Rule 27 of the said rules. Reliance is placed in the decision of the Tribunal in the matter of **Kitply Industries Ltd.** vs. **CC&CE, Meerut-II** reported in 2009 (243) ELT 209 (Tri. Del.).

8. On the other hand, the DR has sought to challenge the impugned order in relation to the reduction in the penalty amount on the ground that the assessee inspite of having collected the duty amount from their buyers had not paid the same to the Government and this apparently disclosed intention to evade the payment of duty and, therefore, according to the DR the authority below was not justified in reducing the penalty which was imposed by the adjudicating authority. In that regard, attention is drawn to the findings arrived at by the adjudicating authority in its order.

9. The adjudicating authority after hearing the parties had arrived at the finding that the assessee's contention that their financial position was deteriorated and as such they could not deposit the duty amount was not tenable as the assessee had collected the value and the duty of the goods sold to their buyers at a time of sale itself was never challenged by the assessee before the Commissioner (Appeals). In fact, even in the course of the argument before the Tribunal no grievance is made regarding the said finding. The same apparently disclosed that even though the assessees were fully conscious and aware that they were collecting the amount which was

payable to the Government as the duty, and they having collected the said amount with the said knowledge did not pay the said amount to the Government in due time. Not only that they waited to pay the same till the department issued a show cause notice to them. It was never the case of the assessees that they were not aware that they were required to pay the same to the Government, rather their response to the show cause notice was to the effect that their financial position had deteriorated and that therefore, they even had to sell the mill. In other words, inspite of being fully aware that they had collected the duty amount payable to the Government, the said amount was retained by the assessees contrary to the provisions of law. It was retained by them till the department initiated the proceedings by issuing a show cause notice. This apparently discloses an intention on the part of the assessees to evade the payment of duty and that was clearly reflected in the show cause notice. The para 3 of the show cause notice read thus:-

> "From the above, it appears that the noticees have contravened the provisions of Rule 8 of the Rules by not paying duty amounting to Rs. 10,30,959/- which is recoverable from them under Rule 8(3) of the Rules read with Section 11-A and Section 11-D of the Act alongwith interest under section 11-AB of the Act. They have also rendered themselves liable for penal action under rule 25 & 27 of the Rules for the above mentioned contraventions".

10. Apparently, therefore, the allegation regarding contravention of the provisions of law in relation to the payment of duty were specifically stated in the show cause notice in order to invite the penalty on the ground of intentional evasion of duty. What is essential for the department is to disclose the basic facts which can reveals such intention, so that the assessees can meet the case of the department in that regard and putforth their defence effectively.

11. If one reads show cause notice, the above quoted para was proceeded by the facts of the case which revealed that pursuant to the scrutiny of AR-1 return for the months of December 2002 and January 2003 it was observed by the department that the assesees had not discharged the duty liability for second fortnight of December 2002 and January 2003 even though they were required to discharge such duty liability by 5th January and 5th of February 2003 respectively and consequently they had defaulted in payment of duty to the tune of Rs. 10,30,959/-. It was also stated that the assessee had not paid the said amount even though they had collected the same from their buyers. Obviously, therefore, the basic facts which were necessary to disclose the intention of the assessee to evade the payment of duty so as to warrant imposition of penalty were clearly stated in the show cause notice.

12. In response to the said show cause notice, the assessees filed their reply on 31.03.2004 after payment of the amount demanded under the show cause notice with the specific defence that they could not pay the amount on account of financial difficulties. In other words, the fact that they had collected the duty amount from their buyers and yet they had not paid the same even though they were required to pay the same by 5th of January and 5th of February 2003 was neither disputed nor denied. Nothing was disclosed which could reveal absence of intention to evade payment of duty. We are fully conscious that the burden of proof to establish intention lies initially upon the department. But this burden can be discharged not only on the basis of the averments made in the show cause notice but also pursuant to the facts disclosed in the reply in the defence taken by the assessee. While deciding the matter the adjudicating authority cannot merely look into the case of the department. When a matter comes before the adjudicating authority, it is not only allegation on the part of the department those are

available before the adjudicating authority but also the defence putforth by the assessee. In those circumstances, it is the duty of the adjudicating authority to consider the entire case in proper prospective. While doing so, it is apparent in the case in hand, that the department had disclosed the necessary basic facts to establish the intention on the part of the assessees to evade the payment of duty and those facts were never denied or disputed by the appellants and on the contrary, the only explanation which was sought to be given was that of financial difficulties. However, apart from mere allegation of financial difficulties, no facts in that regard were placed on record. Obviously, therefore, no fault can be found with the finding arrived at by the authorities below that the evasion of duty was intentional so as to warrant imposition of penalty.

13. It is then sought to be contended that there was no reference to specific clause of Rule 25 of the said Rules.

14. Rule 25 of the said rules undoubtedly specifies different circumstances under which the penalty can be imposed. At the relevant time, it read thus:-

> "Rule 25. Confiscation and Penalty.- (1) Subject to the provisions of section 11AC of the Act, if any producer, manufacturer, registered person of a warehouse or a registered dealer,-
>
> (a) removes any excisable goods in contravention of any of the provisions of these rules or the notifications issued under these rules; or
>
> (b) does not account for any excisable goods produced or manufactured or stored by him; or
>
> (c) engages in the manufacture, production or storage of any excisable goods without having applied for the registration certificate required under section 6 of the Act; or
>
> (d) contravenes any of the provisions of these rules or the notifications issued under these rules with intent to evade payment of duty,

> then, all such goods shall be liable to confiscation and the producer or registered person of the warehouse or a registered dealer, as the case may be, shall be liable to a penalty not exceeding the duty on the excisable goods in respect of which any contravention of the nature referred to in clause (a) or clause (b) or clause (c) or clause (d) has been committed, or [rupees two thousnad0, whichever is greater.
>
> (2)An order under sub-rule (1) shall be issued by the Central Excise Officer, following the principles of natural justice".

15. As already stated above the para 3 of the show cause notice apparently refers to the accusation against the assessee regarding the contravention of the provisions of Rule 8 on account of non payment of duty which was recoverable under Rule 8(3) of the said rules. As already stated above, the above statement in para 3 of the show cause notice was proceeded by the facts based on which the said statement in para 3 was made. Apparently, therefore, the provisions of Rule 25 comprised under clause (d) were clearly attracted. Clause (d) of Rule 25 relates to contravention of any of the provision of the said Rules with intention to evade payment of duty. Para 2 and 3 of the show cause notice not only disclosed the basic facts but also specifically appraised the assessee about the situation which would require imposition of penalty under rule 25 of the said Rules. The contention that the department failed to disclose the specific clause of the Rule and, therefore, there could not have been imposition of penalty is, therefore, to be rejected.

16. What is required under the provisions of law is that the basic facts revealing justification/ or imposition of penalty under any particular provision should be disclosed. Mere failure to mention a particular clause of Rule or Section that could not be a justification to contend that no penalty can be imposed.

17. As regards the contention that in view of the provision of Rule 8 at the relevant time, there was no justification for imposition of penalty is also devoid of substance. Sub-rule 3 and 4 of Rule 8 at the relevant time reads thus:-

> "(3) If the assessee fails to pay the amount of duty by due date, he shall be liable to pay the outstanding amount along with interest at the rate specified by the Central Government vide notification under section 11AB of the Act on the outstanding amount, for the period starting with the first day after due date till the date of actual payment of the outstanding amount.
>
> (4) If the assessee defaults,-
> (i) in payment of any one instalment and the same is discharged beyond a period of thirty days from the date on which the installment was due in a financial year, or
>
> (ii) in payment of instalment by the due date for the third time in a financial year, whether in succession or otherwise,
>
> then, the assessee shall forfeit the facility to pay the dues in instalments under this rule for a period of two months, starting from the date of communication of the order passed by the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, in this regard or till such date on which all dues are paid, whichever is later, and during this period the assessee shall be required to pay excise duty for each consignment by debit to the account current and in the event of any failure, it shall be deemed that such goods have been cleared without payment of duty and the consequences and penalties as provided in these rules shall follow".

18. Sub-rule (4) of Rule 8 apparently discloses that in case of failure to comply with the requirements of the said rule which results in default by the assessee, the consequences stipulated under the statute are bound to follow and they include imposition of penalties. Being so, the relevant provision in that regard is very clear which needs no further elaboration. We do not find any substance in the contention sought to be raised on behalf of the assessee.

19. In Kitply Industries case, the Tribunal while observing that there was bonafide mistake on the part of the assessee had held that the provisions of Section 11AC of the Central Excise Act, 1944 were not attracted. Obviously, in case of bonafide mistake on the part of the appellants, question of intentional evasion of duty does not arise, however, in the case in hand, as already seen above, there was any bonafide mistake in non payment of duty. They had not only collected the duty but the same was payable by specified time i.e 5th of January and 5th of February. They did not pay the same till the show cause notice in that regard was received.

20. Perusal of the impugned order passed by the Commissioner (Appeals) apparently discloses that the lower appellate authority did not interfere in the findings arrived at by the adjudicating authority about intentional failure to pay the duty by the appellants. Once that was not interfered with as rightly pointed out by the DR, there was no justification for Commissioner (Appeals) to interfere with the quantum of penalty imposed by the adjudicating authority.

21. The Commissioner (Appeals) has observed that the appellants started their business of their firm w.e.f. 1.4.2004 and they were not aware or responsible for any delay in payment of duty for the second fortnight of December 2002 and January 2003 and therefore the penalty was not imposable. One fails to understand as to on what basis the said finding has been arrived at. The categorical defence which was raised by the assessee and recorded by the adjudicating authority in its order was that the assessee could not pay the amount on account of their financial difficulties. In other words, they were fully aware of the same. It was their contention that due to financial difficulties they could not pay the duty. The duty liability was in relation to the business carried out by the assessee in the year 2002 and

2003 particularly in December 2002 and January 2003. The commencement of business from 1.4.2004 is totally different issue in the sense it was on account of reorganization of the partnership firm. It has nothing to do with the business of the erstwhile partnership firm. Apparently, the Commissioner (Appeals) referred to totally extraneous grounds to interfere in the quantum of penalty imposed by the adjudicating authority and on that ground alone the impugned order is unsustainable.

22. For the reasons stated above, therefore, the impugned order reducing the penalty could not be sustained and is liable to be set aside and the order passed by the adjudicating authority is restored. Accordingly, the appeal filed by the department is allowed and the appeal filed by the assessee is dismissed. The impugned order is set aside and order passed by the adjudicating authority is restored.

[Justice R.M.S. Khandeparkar]
President

[Rakesh Kumar]
Member [Technical]

/Pant/