

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/690 - 691 / 2009 -SM[BR]

Date 09/11/2010

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

To :
BALKRISHANA INDUSTRIES LTD [2]M/S BALRISHANA INDUSTRIES
A-300-303&E-308-313, RIICO INDUSTRIAL SP-923 , RIICO INDUSTRIAL AREA
AREA,CHOPANKI(BHIWADI) DISTT ALWAR(RAJ) BHIWADI DISTT; ALWAR[RAJ.]
BALKRISHANA INDUSTRIES LTD

Appellant

Vs
Respondent

C.C.E. JAIPUR I

I am directed to transmit herewith a certified copy of Final order No.1196 – 1197 / 2010-SM[BR] dated 22.10.2010 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. JAIPUR I

N.C.R.BUILDING, STATUE CIRCLE, "C" SCHEME, JAIPUR 302005.

2. Adv. / Consult

MR.PDS LEGAL,ADVOCATE

31, MAKER CHAMBERS VI, NARIMAN POINT, MUMBAI

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

14 Office Copy

15 Guard file

Assistant Registrar
(SM Appeal Branch)

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
WEST BLOCK NO.II, R.K. PURAM, NEW DELHI-110066.
SINGLE MEMBER BENCH

Excise Appeal No.690-691 of 2009-SM

(Arising out of Order-in-Original No.03/2009 and 04/2009
dated 15.1.2009 and 27.1.2009 passed by the CCE, Jaipur)

Date of Hearing: 22.10.2010
Date of Decision: 22.10.2010

For approval and signature:

Hon'ble Mr.Ashok Jindal, Member (Judicial)

1	Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	
2	Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	
3	Whether Their Lordships wish to see the fair copy of the Order?	
4	Whether Order is to be circulated to the Departmental authorities?	

M/s.Balkrishna Industries Ltd.

Appellant

Vs.

CCE, Jaipur-I

Respondent

Present for the Appellant: Shri Prakash Shah, Advocate

Present for the Respondent: Shri S.k.Bhaskar, SDR

Coram: Hon'ble Mr.Ashok Jindal, Member (Judicial)

final **ORDER NO.** 1196-1197/2010 SM (B)

PER: ASHOK JINDAL

The appellants have filed these appeals against the imposition of penalty under Rule 25 of Central Excise Rules, 2002 amounting to Rs.10 lakhs each.

2. The facts of the case are that the appellants obtained permission of removal of goods without payment of duty to their warehouse under Rule 4(4) of Central Excise Rules, 2002 which was effective upto 08.12.2007. On 23.1.2008, the

Central Excise Officers seized the goods on the ground that the goods were removed from the factory to the warehouse without any permission after 08.12.2007. A show cause notice was issued to the appellants for demand of duty, confiscation of the goods and imposition of penalty on the ground they cleared the goods without obtaining permission during the period from 08.12.07 to 23.1.08. The same was adjudicated by the adjudicating authority and following order has been passed which is reproduced as under:

ORDER

- (i) I drop the demand of duty of Rs.1,45,33,087/- proposed to be recovered on tyres in the show cause notice dated 05.06.08 against M/s.Balkrishna industries Limited, A-300-303 & E-308-313, RIICO Industrial Area, Chopanki (Bhiwadi) Distt.Alwar (Rajasthan);*
- (ii) I do not confiscate the seized 18689 Rubber Tyres (other) and 7515 Rubber Tyres (Tractor Rear) as proposed in the show cause notice;*
- (iii) I impose a penalty of Rs.10,00,000/- (Rupees Ten Lacs only) on M/s.Balkrishna Industries Limited, A-300-303 & E-308-313, RIICO Industrial Area, Chopanki (Bhiwadi) Distt.Alwar (Rajasthan) under Rule 25 of Central Excise Rules, 2002;*
- (iv) I drop the demand equal to Cenvat Credit availed on 40 MT of Re-claim Rubber and 9 MT of MCB Lubricant as proposed in the show cause notice;*
- (v) I do not impose any penalty under Rule 15 of the Cenvat Credit Rules, 2004 and*

(vi) *I do not confiscate the seized 40 MT of Re-claim Rubber and 9 MT of MCB Lubricant."*

3. Aggrieved by the said order, the appellants are in appeal against the imposition of penalty of Rs.10 lakh each under Rule 25 *ibid*.

4. The learned Advocate for the appellant submits that the penalty is not sustainable on the following grounds:

(1) When the duty has been dropped, the penalty is not sustainable.

(2) When the goods are not liable for confiscation, no penalty can be levied under Rule 25 *ibid*,

(3) When the penalty has been imposed under Rule 25 without specifying any sub clause or which clause of the provisions has been contravened, the penalty cannot be imposed.

5. To support his contention, he places his reliance on the decision of the Larger Bench of the Tribunal in the case of *Godrej Soaps Ltd. vs. CCE, Mumbai* reported in 2004 (174) ELT 25 (Tri-LB), *CCE, Daman vs. Al-Amin Exports* reported in 2007 (211) ELT 305 (Tri-Ahmd) and *CCE, Daman vs. Al-Amin Exports* reported in 2008 (232) ELT A197 (Bombay). He has also relied upon on the decision of the Apex Court in the case *CCE vs.H.M.M.* reported in 2995 (76) ELT 497 (SC).

6. On the other hand, learned DR submitted that in this case it is admitted fact that during intervening period, the appellants

were not having any permission to store the goods in the warehouse and they cleared the goods without permission which amounts to contravention of the provisions of law. He also relied upon the para 28.03 of the impugned order which is reproduced hereunder:

"28.02. Keeping in view the facts that the assessee had cleared the impugned goods under the cover of excise invoices; that they accounted for the said clearances in the RG-1 register and also mentioned in the ER-1 returns filed by them; that the seized goods have since been exported by them under bond or on payment of duty under claim for rebate and that they have been granted status of an 100% EOU and SP-1, RIICO Industrial Area, Chopanki, Bhiwadi, Rajasthan (where the impugned tyres have been seized and duly demanded) as its additional location by the Development Commissioner and to meet the ends of justice it would not be justifiable to either demand the duty or order for confiscation in respect of the seized goods. I am therefore inclined to hold accordingly.

"28.03. It is not in dispute that earlier permission, under Rule 4(4) of Central Excise Rules, 2002, granted to the assessee by the competent authority was valid upto 8.12.2007. Thereafter permission was sought by the assessee only on 23.01.2008 i.e. the day on which the impugned tyres were seized. For the intervening period i.e. from 9.12.2007 to 23.1.2008 the assessee had neither permission nor sought the permission under Rule 4(4) of Central Excise Rules, 2002. They have pleaded that during the period from 8.12.2007 to 23.1.2008 when the goods were removed to the warehouse by the two units and the warehouse at Chopanki were registered as EOUs, hence there was no requirement for permission for movement within the EOU under Rule 4(4) of the Central Excise Rules, 2002. This plea of the assessee is not tenable for the reason that Customs Licence No.04/CUS/LICENCE/BKT/BHD/2007 issued under Section 58 & 65 of the Customs Act, 1962 on

27.11.2007 to the assessee was surrendered by the assessee vide their letter dated 17.12.2007 and no separate licences have been issued to them. In other words, after surrendering the Customs Licence on 17.12.2007, the assessee cannot be treated as working under 100% EOU Scheme. In view of this, I am of the view that during the said period the clearances of the finished goods without payment of duty and storage of the same at SP-1, RIICO Industrial Area, Chopanki were not in consistent with the provisions of Central Excise Rules and thus, the assessee have rendered themselves liable for penalty under Rule 25 of Central Excise Rules, 2002."

7. He further submitted that in the case of Kumar Cotex Ltd. vs. CCE, Guntur reported in 2009 (245) ELT 329 (Tri.-Bang), the Tribunal held that non mentioning of sub-rule under Rule 25 ibid only a technical lapse. Hence the impugned order imposing penalty is to be upheld.

8. Heard and considered the submission made by both sides.

9. I have gone through the adjudication order. The appellants have challenged this order on the following grounds:

(1) When the demand has been dropped, no penalty can be levied. In support of this, he places reliance on the decision of the Larger Bench of this Tribunal in the case of Godrej Soaps (Supra) wherein the larger Bench of this Tribunal has held that when demands gets dropped on any account, penal provisions cannot survive against the assessee.

(2) When there is no confiscation of the goods, penalty cannot be levied under Rule 25 ibid. In the case of Al-Amin Exports, this Tribunal has held that in para 6 of the order that both show cause notice and order of the original authority suffer from

infirmity inasmuch as the particular clause of Rule 25 under which the goods are proposed to be confiscated has not been indicated. It was further observed by this Tribunal that the goods are not liable for confiscation as goods purchased from the open market were not required to be accounted for in the statutory records and action if any lies in respect of the goods obtained under CT-3 certificate which was never used for the purpose of export. The confiscation cannot also be upheld on the ground that specific clause of Rule 25 of Central Excise Rules, 2002 has not been cited in the show cause notice or in the order of the adjudicating authority. Since, the goods themselves held are not liable for confiscation, penalty cannot be imposed on the appellants under Rule 25 *ibid*. The same view has been affirmed by the Hon'ble High Court of Bombay also in this case on appeal filed by the Revenue against the finding of this Tribunal.

(3) In the adjudication order, no sub-clause of Rule 25 has been mentioned under which the penalty imposed. On this issue, he also relied upon the *Al-Amin Exports*.

10. The reliance placed by the learned DR is not relevant to this case when there is no judgement of Hon'ble High Court confirming that no penalty can be imposed when there is no sub-rule specified while imposing penalty. The reliance of the DR in the case of *Dharmendera Textiles* for imposing penalty *no mensrea* is required as Hon'ble Supreme Court in the case of *Rajasthan Spinning & Weaving Mills Ltd.* held that to impose

penalty the provisions of Section 11AC are required to be complied with.

11. I have examined these submissions of the learned Advocate that in the adjudication order itself the adjudicating authority held that the goods are not liable for confiscation following the Bombay High Court in the case of Al-Amin Exports (supra) wherein it was held that when the goods are not held liable for confiscation, no penalty can be imposed. Accordingly, in this case also, the penalty is not warranted.

12. Hence, the impugned order is set aside and the appeals are allowed with consequential relief, if any.

(ASHOK JINDAL)
MEMBER (JUDICIAL)

mk