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

Appeal No. **E/2746/2009 – SM [BR]** Date **21/07/2011**

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

To :
M/S PREMIER BARS PVT. LTD.
A-106, RIICO INDUSTRIAL AREA, BAGRU EXTN.
BAGRU, JAIPUR.
M/S PREMIER BARS PVT. LTD. Appellant

Vs

C.C.E. JAIPUR I Respondent

I am directed to transmit herewith a certified copy of **Final order No. 419 /2011-SM[BR]** dated 13.7.2011 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 SHRI BIPIN GARG ADV.
B-1/1289-A, VASANT KUNJ NEW DELHI

3. C.D.R
4. Bar association, CESTAT, New Delhi
5. Director Publications, Customs, Excise. I.P. Estate, New
6. M/s Centax Publictions Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi -
7. Company Law Institute of India Pvt Ltd.,No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
8. Taxmann Allied Service Pvt Ltd., 59/32, New Rohtak Road, New Delhi -
9. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road, Ahmedabad-15
10. LAWCRUX Advisors Pvt Ltd. LAW House,1-8,Sector - 10, Faridabad 121003 (Haryana)
11. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
12. Office Copy
13. Guard file

Assistant Registrar
(SM Appeal Branch)

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
West Block No.2, R.K.Puram, New Delli,

Court No.IV

Date of hearing & decision : 13. 07. 2011

Ex. Appeal No.2746/09-SM

(Arising out of O/A No. 163 (DK)/CE/JPR-I/2009 dated 27.7.2009 passed by Commr.of Central Excise (Appeals), Jaipur I)

For approval and signature:

Hon'ble Shri 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 His Lordship wishes to see the fair copy of the Order? :
4. Whether Order is to be circulated to the Departmental Authorities? :

M/s Premier Bars Pvt. Ltd. ...APPELLANT(S)

VERSUS

CCE, Jaipur I

RESPONDENT (S)

APPEARANCE

Rep. by Mrs. Sukriti Das, Adv. for the Appellant (s)
Rep. by Shri S. K. Panda, JCDR for the Department

CORAM:

Hon'ble Shri Ashok Jindal, Member (Judicial)

Final Oral Order No. 419/2011 SM(Br)

Per Shri Ashok Jindal :

The appellants are challenging the impugned order wherein duty demands on shortages have been confirmed along a mandatory penalty under Section 11AC of the Central Excise Act, 1944.

2. Brief facts of the case are that on 13.7.07, a surprise visit of the factory premises of the appellants was done by Anti Evasion Wing of the Central Excise Department. During the course of investigation, the books of account, raw materials/finished goods were cross-checked and it was found that a quantity of 53.080 MT of M.S.Ingots were short as shown in the books of account. Therefore, the statement of the Director of the appellant firm was recorded wherein he has admitted that shortages might have been used for manufacturing of their final product and have been cleared without any knowledge. Therefore, he accepted to pay the duty on these shortages. It was paid by the appellants. Thereafter, a show-cause notice was issued for proposing demand on shortages of inputs and proposed a penalty under Section 11AC of the Central Excise Act, 1944. The show-cause notice was adjudicated. The demand was confirmed along with equal amount of penalty under Section 11AC. The said order was challenged by the appellants before the Commissioner (Appeals) who confirmed the adjudication order. Aggrieved from the said order, the appellant is before me.

3. Mrs. Sukriti Das, ld. Advocate appearing on behalf of the appellants, submitted that in this case at the time of visit, certain inputs were found short, but the charge against the appellant is of

clandestine removal of the finished goods which has not been proved by corroborating evidence and on mere statement of the Director, the charge cannot be alleged against the appellant. Therefore, she prayed that the impugned order confirming duty and penalty be set aside. She further submitted that in the case of Commissioner of Central Excise, Chandigarh Vs. Nachiketa Paper Ltd. reported in 2008 (225) ELT 194 (P & H), the Hon'ble Punjab & Haryana High Court for the similar set of facts has dropped the penalty under Section 11AC. She also relied on the decision of the Commissioner of Central Excise, Customs & Service Tax, Daman Vs. Nissan Thermoware P. Ltd. reported in 2011 (266) ELT 45 (Guj.). She further submitted that the stock taking was not done properly, therefore, there may be variation and stock taking [illegible] resulted in shortages.

4. On the other hand, Shri S. K.Panda, ld. JCDR appearing on behalf of the Revenue, submitted that in this case, the appellants themselves have admitted the shortages of inputs in their factory and while stock taking was done, the shortage was accepted by the appellants, therefore, the Department is not responsible to prove with the corroborative evidence of clandestine removal of the finished goods as the appellants have themselves admitted. He also relied upon the decision of the Hon'ble Supreme Court in the case of Bhoonmull reported in 1983 (13) ELT 1546 (SC) wherein the Hon'ble Apex Court has held that the admitted facts need not to be proved. He further relied upon the decision in the case of Ambuja Cement reported in 2010 (260) ELT 511 (Mad.) wherein the Hon'ble High Court confirmed

the duty demand on shortages of inputs on the charge of clandestine removal of the same. He also relied upon the Tribunal's decision in the case of Shri Ulaganayagi Ammal Steels Vs. Commissioner of Central Excise, Trichy on the issue of stock tacking wherein the Tribunal has held that ascertaining average actual weight per piece from a sample set and counting total pieces to determine entire weight of stock is a scientific method. Therefore, the allegation that the counting of stock was not done properly is not admissible. Hence, the impugned order is to be confirmed.

5. Heard both sides. On careful examination of the submissions from both sides, I find that it is an admitted case that there was a shortage of inputs during the course of visit of Anti Evasion Team. During the course of investigation, the statement of Director was recorded and in his statement, he has admitted that in his absence these inputs might have been gone for manufacturing of final product which may be removed without his knowledge. He also admitted to pay the duty which has been paid by the appellants. As held by the Hon'ble Apex Court in the case of M/s Bhoonmull (supra) that the admitted facts need not to prove, hence, in this case, the appellants themselves are admitted the shortages of inputs and paid duty on such shortages, therefore, the impugned order confirming duty is upheld.

6. To impose a penalty under Section 11AC, there should be an act of malafide intention on behalf of the assessee by way of fraud, collusion, willful mis-statement and suppression of fact and

contravention of provisions of Act/Rules with intent to evade duty. As admitted in the facts and circumstances, that during inspection shortages of the inputs were found . If certain inspection has been made to any assessee and certain shortages are found in that case, it cannot be said that there was any malafide intention of the assessee to evade duty. Therefore, the benefit of doubt is to be given to the assessee. Similar view, in the similar set of facts has taken by the Hon'ble Punjab & Haryana High Court in the case of Nachiketa Paper Ltd. (supra) wherein the Hon'ble High Court has observed that as the assessee has admitted the shortages of inputs and paid duty thereon, therefore, it cannot be said that there was any intention to remove the goods/finished goods clandestinely. Therefore, in the absence of any ingredient of Section 11AC and following the law laid down by the Hon'ble High Court Punjab & Haryana in the case of Nachiketa Paper Ltd. (supra), the duty is confirmed and the penalty is dropped. I order accordingly. The Appeal is disposed of in the above terms.

(Dictated and pronounced in the open Court)

(Ashok Jindal)
Member (Judicial)

mm