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

Appeal No. : E/2632/2001-EX[DB]

Dated: **28/08/2012**

Assistant Registrar
C.E.S.T.A.T. New Delhi
To,
RAYALASEEMA CONCRETE S
LEEPERS(P) LTD.
P.O. KARGI ROAD, DISTT.
BILASPUR-CG

RAYALASEEMA CONCRETE S (Appellant)

VS

C.C.E. RAIPUR (Respondent)

I am directed to transmit herewith a certified copy of Final Order No. **A/981/2012-EX[DB]** dated **24/08/2012** passed by the Tribunal under section **35-C(1) of the Central Excise and Salt Act, 1944.**

Assistant Registrar
EXCISE Appeal Branch

Copy To,
1. **Respondent**
C.C.E. RAIPUR
Central Excise Building, Dhamtari Road,
Tikrapara, Raipur 492001.

2. **Advocate(s) / Consultant(s):** SH. HRISHIKESH, ADV,
A-5, BASEMENT,
LAJPAT NAGAR -III, N. DELHI-24

3. **C.D.R**
4. Bar Association, CESTAT, New Delhi

5. Director Publications, Customs, Excise. I.P. Estate, New Delhi

6. M/s Centax Publications Pvt. Ltd., 1512-B, Bhishm Pitamah Marg, Opp. ICICI Bank of Defence Colony, New Delhi-3

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-110005

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. Gaurd File

Assistant Registrar
EXCISE Appeal Branch

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.
Principal Bench, New Delhi

COURT NO. I

DATE OF HEARING : 31/07/2012.
DATE OF DECISION : 24/10 /2012.

Excise Appeal No. 2632 of 2001

[Arising out of the Order-in-Original No. 491/CH. 68/Commr/ 2001 dated 09/10/2001 passed by The Commissioner, Central Excise, Raipur.]

Hon'ble Shri Justice Ajit Bharihoke, 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?	:
2.	Whether it would 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 Department Authorities?	:

M/s Rayalaseema Concrete Sleepers (P) Ltd. Appellant

Versus

CCE, Raipur Respondent

Appearance

Shri Hrishikesh, Advocate – for the appellant.

Shri I. Baig, Authorized Representative (DR) - for the Respondent.

CORAM : **Hon'ble Shri Justice Ajit Bharihoke, President**
Hon'ble Shri Rakesh Kumar, Member (Technical)

FINAL Order No. A/ 981/2012-EX(DB) Dated : ________

Per. Rakesh Kumar :-

The facts leading to this appeal are, in brief, as under.

1.1 The appellant manufacture mono block concrete cement sleepers for railways which are chargeable to Central Excise duty under heading 6807 of the Central Excise Tariff. They had supplied these sleepers to railways against contract with price escalation clause. Though during the contract period, at the time of clearances to the railways the duty had been paid at the provisional price, which was subject to revision, the appellant had not gone in for provisional assessment. During period from 31/11/92 to 31/8/98 they raised 13 price escalation bills on railways for an amount of Rs. 1,93,41,855/- plus excise duty of Rs. 38,19,260/-. Though against these bills they received payment from the railways during May 1999 to August 1999 period, neither at the time of issue of the invoices for the price escalation amount nor at the time of receiving the payment they paid the duty on price escalation amount. This non-payment of duty on the price escalation amount received, was detected when the Jurisdictional Central Excise officers on receipt of an intelligence in this regard, checked their books of accounts. It is on this basis that a show cause notice dated 22/3/2000 was issued to the appellant for recovery of short paid duty amounting to Rs. 13,26,410/- during the period from 26/6/95 to 31/8/98, alongwith interest on this duty under Section 11AB and also for imposition of penalty on them under Section 11AC. The show cause notice also sought confiscation of the land, building, plant and machinery of the appellant under Rule 173Q (2) of Central Excise Rules, 1944. This show cause notice was adjudicated by the Commissioner, Central Excise, Chhattisgarh vide order-in-original dated 27/9/2001 by which –

(a) the duty demand as made in the show cause notice was confirmed against the appellant alongwith interest, and an amount of Rs. 6,04,252/- already paid before adjudication was appropriated towards this demand ;

(b) mandatory penalty of Rs. 13,26,410/- equal to the amount of duty short paid was imposed on the appellant under Section 11AC of Central Excise Act, 1944 ; and

(c) penalty of Rs. 50,000/- was imposed on the appellant under Rule 173Q of the Central Excise Rules, 1944.

The Commissioner, however, did not order confiscation of the land, building, plant and machinery of the appellant under Rule 173Q (2).

1.2 On appeal being filed by the appellant against this order of the Commissioner, the Tribunal vide final order No. 370/2002 dated 7/8/2002 while upholding the duty demand alongwith interest and also upholding the imposition of penalty under Section 11AC, reduced the penalty to Rs. 2,00,000/-. With regard to interest, the Tribunal held that the interest liability would be only in respect of the duty demand for the period after 28/9/96.

1.3 Against this order of the Tribunal, the department filed a reference appeal No. 3/2003 before Hon'ble Chhattisgarh High

Court and Hon'ble High Court held that in view of the judgment of the Apex Court in the case of **Union of India vs. Dharamendra Textile Processors** reported in **2008 (13) SCC 369**, held that there was no discretion either for Adjudicating Authority or for Appellate Authority to reduce the penalty to an amount lower than the duty demand confirmed in a case where the elements for imposition of penalty under Section 11AC are present. Accordingly, Hon'ble High Court remanded this matter to the Tribunal for passing the appropriate order with regard to penalty in accordance with the judgment of the Apex Court in the case of **Union of India vs. Dharamendra Textile Processors** (supra) and also in the subsequent judgment of the Apex Court in the case of **Union of India vs. Rajasthan Spinning and Weaving Mills** reported in **2009 (13) SCC 448**.

1.4 In accordance with the directions of Hon'ble Chhattisgarh High Court the matter was heard today on the question of quantum of penalty under Section 11AC.

2. Heard both the sides.

3. Shri Hrishikesh, Advocate, the learned Counsel for the appellant, pleaded that while in terms of the provisions of Section 11AC in a case where short payment, non-payment or erroneous payment or duty has taken place due to fraud, wilful misstatement, suppression of fact, etc. on the part of an assessee, penalty equal to the duty demand confirmed is imposable and in terms of judgment of the Apex court in the case

of **Union of India vs. Rajasthan Spinning and Weaving Mills** (supra), the concerned Adjudicating or Appellate Authority has no discretion to impose a lower penalty in a case where the elements for imposition of penalty under Section 11AC are present, the provisions of Section 11AC can be invoked only in respect of those clearances which had been made on or after 28/9/96, the date on which Section 11AC had come into effect and the provisions of this Section cannot be invoked in respect of the clearances made prior to this date, that in this regard he relies upon judgment of the Apex Court in the case of **CCE, Coimbatore vs. ELGI Equipments Ltd.** reported in **2001 (128) E.L.T. 52 (S.C.)**, wherein it was held that Section 11AC of Central Excise Act, 1944 is prospective in-operation and offences prior to insertion of the said section in this Act, cannot be subject matter of the penalty under said provisions, and that same view has been taken by the Apex Court in the case of **CCE, Mumbai - I vs. Lal Mining Engg. Works** reported in **2007 (215) E.L.T. 167 (S.C.)**. He, therefore, pleaded that in view of the above judgments of the Apex court penalty imposable under Section 11AC would be only the duty in respect of clearances made on or after 28/9/96.

4. Shri I. Baig, the learned Departmental Representative defending the Commissioner's order pleaded that in this case while the invoices for escalation amount on account of price escalation from back date had been issued during the period from 1995 to 1998 the amount had been received only in 1999 well

after the insertion of Section 11AC in the Central Excise Act, that the differential duty in respect of the clearances of mono block sleepers to railway become payable as soon as the differential amount on account of price escalation from back date was received by the appellant, that the appellant neither paid duty at the time of receiving the price differential nor informed the department about this and this non-payment of duty was detected only in course of scrutiny of their accounts by the department which was done on receipt of an intelligence by the department. He, therefore, pleaded that the penalty equal to the duty demand i.e. Rs. 13,26,410/- is imposable on the appellant as this is the duty chargeable on the price differential received by them in the year 1999.

5. We have considered the rival submissions.

6. While the clearances have been made during the period from ~~duty~~ June 1995 to 31/8/98, the price differential on account of price escalation from back date was received by the appellant in the year 1999 and accordingly the duty had become payable at that time only. Since neither the duty was paid by the appellant nor the receipt of price differential was intimated by them to the Jurisdictional Central Excise officers, it is clear that the appellant have suppressed the relevant facts from the departments and, hence, the penal provisions of Section 11AC would be attracted. We also take note of the fact that the Tribunal in the final order dated 7/8/02 has upheld the entire duty demand which had been confirmed by invoking extended period under proviso to Section

11A (1) and the conditions under which the proviso to Section 11A (1) of the Central Excise Act, 1944 and the conditions in which the penalty under Section 11AC is attracted, are identical. In view of this, we hold that penalty under Section 11AC would be attracted and in view of judgment of the Apex Court in the case of **Union of India vs. Rajasthan Spinning and Weaving Mills** (supra), the same would be equal to the quantum of the duty demand confirmed, as there is no discretion either for the Adjudicating Authority or for the Appellate Authority to impose the lower penalty under Section 11AC. The judgments of the Apex Court in the cases of **CCE, Coimbatore vs. ELGI Equipments Ltd.** (supra) and **CCE, Mumbai vs. Lal Minining Engg. Works** (supra) are not applicable to the facts of this case as in this case, the duty on the price escalation amount become payable only in 1999 when the price escalation amount ~~is~~ was received and which was not paid by the appellant at that time. In view of this, we uphold the Commissioner's order imposing penalty equal to the duty demand confirmed and, as such, the appeal filed by the appellant on this point stands dismissed.

24/8/2012

(Order pronounced in open court on ~~28~~ /2012.)

(Justice Ajit Bharihoke)
President

(Rakesh Kumar)
Member (Technical)

PK