FAX : 011-26108426

REGISTERED / AD

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

Dated: **27/11/2012**

To

Appellant as per address in table below

Respondent as per address in table below

Final Order No. **A/1326/2012-EX[DB]** dated **06/11/2012**

I am directed to transmit herewith a certified copy of order passed by the Tribunal under section **35-C(1) of the Central Excise and Salt Act, 1944.**

Asstt. Registrar(EXCISE Appeal Branch)

Name and Address of Respondent

1 E/2403/2005 **ALAKHANDA CEMENT PVT.LTD.**
D-15,Industrial Area Ram Nagar
Chandauli & Others

Name and Address of Appellant

2 **C.C.E.ALLAHABAD U.P**
38.M.G.Road,Civil Lines Allahabad U.P

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Copy To

3Advocate(s) / Consultant(s): SH. BIPIN GARG,ADV.,
B-1/1289-A, VASANT KUNJ, N. DELHI-70

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4 Bar Association, CESTAT, Delhi

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

6 M/s Centax Publications Pvt. Ltd., 1512-B, Bhishm Pitamah Marg, 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, Satellite Road, Ahmedabad-15

10 LAWCRUX Advisors Pvt. Ltd., LAW House, 1-8, Sector-10, Faridabad 121003 (Haryana)

11 TaxIndiaOnline.com Pvt. Ltd., 2nd Floor, Vasant Arcade, Vasant Kunj, New Delhi - 110070

12 Mark Professional Services Pvt. Ltd., 108, Everest Block, Aditya Enclave, Hyderabad – 38

13 C.D.R. 14 Office Copy 15 Guard File

Asstt. Registrar(EXCISE Appeal Branch)

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI, PRINCIPAL BENCH NEW DELHI

Date of Hearing/ Decision:06.11.2012

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?	

Excise Appeal No.E/2403 of 2005

CCE, Allahabad ...Appellants

Vs.

M/s. Alaknanda Cement (P) Ltd. ...Respondent

Appearance: Shri R. K. Verma, DR for the appellant.
Shri Bipin Garg, Advocate for the respondent.

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

FINAL ORDER NO. A/1326/2012-EX(BR)

Per Rakesh Kumar:

The respondents are manufacturer of cement. A case of clandestine removal of cement involving duty of Rs.3,17,089/- was booked against them by jurisdictional central excise officers. After issue of show cause notice to them, the jurisdictional Asstt. Commissioner vide order-in-original dated 31.08.2004 confirmed the duty demand of Rs.3,17,089/- against the respondent along with interest and besides this also, imposed penalty of equal amount on them. On appeal being filed by the respondent company before the Commissioner (Appeals), the Commissioner (Appeals) confirmed the duty demand. He, however, reduced the penalty amount by Rs.51,817/- taking note of the fact that this amount of excise duty had been deposited by the appellant even before the issue of show cause notice. Against this order of the Commissioner (Appeals), this appeal is filed by the Revenue.

2. Heard both the sides.

3. Shri R.K. Verma, DR assailed the impugned order pleading that just because of a part of the duty has been deposited before the issue of show cause notice, this would not be ground for reduction of penalty imposable under Section 11 AC to that extent and that in this regard, he relies upon the

Apex Court's judgement in the case of **Dharamendra Textile Processors reported in 2008 (231) ELT 3 (SC)** and also in the case of **Rajasthan Spinning & Weaving Mills reported in 2009 (238) ELT 3 (SC)**. He, therefore, pleaded that the impugned order of the Commissioner (Appeals) reducing the penalty to Rs.2,66,272/- is not correct.

4. Ld. Shri Bipin Garg, Advocate has argued in support of the impugned order. He has referred to 1st and 2nd proviso to Section 11 AC of the Central Excise Act, 1944 and submitted that the benefit of reduction of penalty to 25% is available to the respondent even if he deposits the entire excise duty with interest pursuant to the order of the Tribunal because no option was given by the original adjudicating authority in this regard. In support of his contention, he has relied upon the judgement of the Hon'ble Delhi High Court in the case of **K.P. Pouches (P) Ltd. Vs. Union of India reported in 2008 (228) ELT 31 (Delhi)** as also the judgement of Gujarat High Court in the matter of **Commissioner of Central Excise Vs Harish Silk Mills reported in 2010 (255) ELT 393 (Guj.)**.

5. We have considered the rival contentions and perused the records. It is admitted case of the parties that the respondent preferred an appeal against the confirmation of duty demand by the Commissioner (Appeals)

and the aforesaid appeal was dismissed by the CESTAT. It is not the case of the respondent that even after dismissal of the appeal by the CESTAT, the respondent has deposited the entire amount of duty confirmed against them with interest within 30 days of the receipt of the copy of that order by the respondent. That being the case, in our considered view, the respondent by no stretch of imagination can take advantage of 1st and 2nd of Section 11 AC of the Central Excise Act, 1944. Section 11 AC of the Central Excise Act, 1944 is reproduced thus:-

"11AC. PENALTY FOR SHORT-LEVY OR NON-LEVY OF DUTY IN CERTAIN CASES.

[1][11AC. Penalty for short-levy or non-levy of duty in certain cases.—Where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reasons of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, the person who is liable to pay duty as determined under sub-section (2) of section 11A, shall also be liable to pay a penalty equal to the duty so determined:

[2][Provided that where such duty as determined under sub-section (2) of section 11A, and the interest payable thereon under section 11AB, is paid within thirty days from the date of communication of the order of the Central Excise Officer determining such duty, the amount of penalty liable to be paid by such person under this section be twenty-five per cent. of the duty so determined:

Provided further that the benefit of reduced penalty under the first proviso shall be available if the amount of penalty so determined has also been paid within the period of thirty days referred to in that proviso:

Provided also that where the duty determined to be payable is reduced or increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the Court, then, for the purposes of this section, the duty, as reduced or increased, as the case may be, shall be taken into account:
Provided also that in case where the duty determined to be payable is increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the Court, then, the benefit of reduced penalty under the first proviso shall be available, if the amount of duty so increased, the interest payable thereon and twenty-five per cent. of the consequential increase of penalty have also been paid within thirty days of the communication of the order by which such increase in the duty takes effect.

Explanation.—For the removal of doubts, it is hereby declared that—

(1) the provisions of this section shall also apply to cases in which the order determining the duty under sub-section (2) of section 11A relates to notices issued prior to the date on which the Finance Act, 2000 receives the assent of the President;

(2) any amount paid to the credit of the Central Government prior to the date of communication of the order referred to in the first proviso or the fourth proviso shall be adjusted against the total amount due from such person.]"

6. Bare reading of the above provisions indicates that in the cases in which the excise duty has been paid or short paid by reason of fraud, collusion or any wilful mi-statement or suppression of facts, or

contravention of any of the provisions of this Act or of the Rules made thereunder with intent to evade payment of duty, the person who is liable to pay duty as determined under Sub-section (2) of Section 11 A, shall also be liable to pay a penalty equal to the duty so determined. Admittedly, the duty demand on the ground of clandestine removal has been confirmed against the respondent and the appeal against aforesaid confirmation has been dismissed by CESTAT. Therefore, in view of the above provisions, the respondent is liable to pay the penalty equal to the amount of duty confirmed against them. Coming to the proviso 1^{st} & 2^{nd}, on reading of the aforesaid provisos, it is apparent that benefit of reduction of penalty to 25% can be availed by the assessee provided he deposits the duty demand confirmed against him along with interest and 25% of the duty as penalty within 30 days of communication of the order confirming the demand. In the instant case, the respondent himself admits that the duty demand has been confirmed against them and he has not pleaded deposit of the duty within 30 days of the order of the confirmation of duty demand either by the adjudicating authority or by the Commissioner (Appeals) or by CESTAT. That being the case, the judgement of **K.P. Pouches (P) Ltd.** (supra) as also the judgement of Gujarat High Court in the case of **Harish Silk Mills (supra)** are of no avail to the respondent .

7. In view of the above discussion above, we are of the view that the Commissioner (Appeals) committed a grave error in reducing the penalty ignoring the provisions of Section 11 AC of the Central Excise Act, 1944. Accordingly, the appeal is accepted and it is ordered that the respondent shall pay increased penalty of Rs.3,17,089/- as imposed by the order-in-original.

(Justice Ajit Bharihoke)
President

(Rakesh Kumar)
Member (Technical)

Ckp.