IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI
PRINCIPAL BENCH, COURT NO. II

Excise Appeal No. 52263 & 52266 of 2016 SM

[Arising out of Order-in-Appeal No. 95-96/CE/DLH /2016 dated 09.05.2016 passed by the Commissioner, Central Excise, Delhi II]

Shri Surendra Kumar Bhura **Appellant**
M/s. Kumar Metals Pvt. Ltd.

Vs.

Commissioner of Central Excise **Respondent**
Delhi II

Appearance:

Shri B Bhushan, Advocate for the Appellants
Shri Sanjay Jain, DR for the Respondent

CORAM:

Hon'ble Mr. Ashok K Arya, Member (Technical)

Date of Hearing/ Decision: 28.04.2017

FINAL ORDER No. 53408-53409 /2017 SM

Per: Ashok K Arya:

The appellants are in appeal against order in appeal No. 95-96/2016 dated 9.5.2016 passed by Commissioner, Central Excise, whereunder order in original dated 7.1.15 passed by Assistant Commissioner has been sustained except reduction in penalty on the appellant Shri Surendra Kumar Bhura, from Rs.71,893/- to Rs.25,000/-.

2.1 Brief facts of the case are that:-

(i) the department conducted preventive checks on the appellant-assessee unit where finished goods as per daily stock register were declared as 5019 Kgs whereas physically the goods were found to be 4000 Kg. only. Thus, there was shortage of 1019 Kg of finished goods which was accepted by the Director of the Company, Shri Surendra Kumar Bhura saying that shortage was due to negligence of the staff.

(ii) The appellant-assessee voluntarily paid the duty for the shortages found.

(iii) The department vide order-in-original confirmed the demand of Rs.71,893/- along with equivalent penalty on the appellant-assessee, and equivalent personal penalty on Shri Surendra Kumar Bhura who is also one of the appellants.

3. With the above background both sides represented by learned counsels, Shri Bharat Bhushan for the appellants and Shri Sanjay Jain for the Revenue have been heard.

4. After careful perusal of the facts on record and the submissions of both the sides, it appears that the department has not taken full pains to make fool proof case against the assessee. The whole case is made mainly on the mere statement of the Director of the Company. The Director Shri Bhura in the statement has accepted the liability of payment on account of shortage found of the finished goods and paid duty voluntarily of the respective amount.

4.1 The learned Counsel for the appellant submits that panchnama does not show how the stock was physically verified. But when the Director in his statement himself accepted the shortage and says that this is caused by negligence of the staff, at this juncture such a plea does not have sufficient force to give the required relief in respect of duty payment for such goods.

4.2 However, the charge of clandestine removal by an assessee is itself a serious charge which needs to be proved beyond reasonable doubt. Revenue is required to go to the customers to whom the said non-duty paid goods were cleared. When there is no record of such clearances in any form (loose slips or printed record) found, department's charge is mere statement. In the instant case, the duty has already been paid voluntarily by the assessee and when there is no retraction of the statement made by the Director, the liability of duty on said shortage cannot be reversed.

4.3 The Revenue has imposed equivalent penalty on the assessee-appellant under section 11AC of the Central Excise Act. Section 11AC of Central Excise Act call for imposition of equivalent penalty in the cases involving fraud, collusion or any willful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the Rules made thereunder with an intent to evade payment of duty. This is a serious charge, but there are not enough evidences to corroborate, establish and prove that the assessee resorted to fraud, collusion, willful mis-statement or suppression of facts or contravention of laws of Excise with intent to evade payment of duty. When the statement of Director of the assessee company was that it is due to negligence of staff, it can not be stated that it is with the 'intent to evade payment of duty'. When the shortage was informed, the assessee made the payment to discharge the liability of Central Excise duty. Thus, the Revenue fails to offer any substantial evidence against the appellants to prove fraud, collusion, willful misstatement with intent to evade duty. Therefore, the present case appears to be covered by Tribunal's decision in the case of ***Ranjan Processors vs. CCE, Jaipur II [2010 (262) ELT 696 (Tri-Del)***] where the penalty imposed under section 11AC was modified and a reduced penalty was imposed under Rule 27 of Central Excise Rules, 2002. The Tribunal in the said decision observes as under:-

> ***"6.*** *I have carefully considered the submissions from both sides and perused the record. The shortage of finished goods to the tune of 37,609 metres stands admitted. Whether the shortage is huge or nominal has to be seen in the light of the quantum of production and clearance effected by the company. Learned SDR fairly concedes that the actual stock as per the register is not clear from record. However, he submits that this is huge stock. The controversy whether the shortage is huge or nominal is only academic in nature in the absence of the relevant statistics. It is to be noted that the appellants admitted the shortage and paid duty voluntarily. It is clarified by the learned Advocate for the appellants that there is no retraction of the statement given by the representatives of appellants and that there is no refund claim filed by them. The obligation to account for the finished goods manufactured by the appellants is a strict obligation. In the absence of discharging the said obligation the duty is demandable and the same stands already paid. At this stage, they cannot be allowed to raise the dispute about the duty demand and the interest liability. However, the allegation of clandestine removal is a serious one. Every case*

of shortage cannot be presumed to be a case of clandestine removal. The charge of clandestine removal requires to be established by proper investigation. In this case, admittedly, no evidence like any private records indicating clandestine clearance of goods or seizure of clandestinely removed goods from the premises of the dealers etc. was relied up on. Therefore, the finding that the goods found shortage should be presumed to have been cleared clandestinely cannot be sustained in the absence of any evidence indicative of such clandestine removal. Undoubtedly, the charge of improper maintenance of accounts is established.

7. *In view of the above, the appeal of the party in so far as it relates to demand of duty and order for recovery of interest is concerned, the same is rejected. Penalty of Rs. 1,98,576 imposed under Section 11AC is modified as penalty of Rs. 5,000/- under Rule 27 of the Central Excise Rules.”*

4.4. Thus considering the facts and submissions of both the sides and the Tribunal’s order (supra) it is a case where provisions of section 11AC of Central Excise Act, 1944 are not attracted but penalty under Rule 27 of Central Excise Rules, 2002 may be imposed. Therefore, the penalty of of Rs. 71,893/- imposed on the appellant-assessee is reduced to a penalty of Rs.5,000/- (Rupees Five thousand only) under Rule 27 of the Central Excise Rules, 2002.

5. The personal penalty of equivalent amount of duty involved has also been imposed on other appellant, Shri Surendra Kumar Bhura, Director of the assessee company. However, when there are no malafides established in case of the appellant Director, penalty under Rule 26 in his case cannot be sustained. The knowledge of the appellant Director, Shri Bhura is not proved from the facts on record. Therefore, this penalty imposed under Rule 26 is hereby dropped.

6. The impugned order is modified to above effect and both the appeals stand disposed off in the above terms.

(dictated and pronounced in the open Court)

(Ashok K Arya)
Member (Technical)

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