

**IN THE CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI**

Appeal No. E/1163/09

(Arising out Order-in- Appeal No. AGS-184-72/2009 dated 11.08.2009 passed by the Commissioner of Central Excise & Customs, Aurangabad)

For approval and signature:

Hon'ble Shri Ramesh Nair, Member (Judicial)

Hon'ble Shri C J Mathew, 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?	No
2.	Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	No
3.	Whether Their Lordships wish to see the fair copy of the Order?	Seen
4.	Whether Order is to be circulated to the Departmental authorities?	Yes

Commissioner of Central excise & Customs,
Aurangabad

Appellant

Vs.

Crompton Greaves Ltd.

Respondent

Appearance:

Shri N.N. Prabhudesai, Suptd (AR) for the appellant
Shri Sachin Chitnis, Advocate for the respondent

CORAM:

Hon'ble Shri Ramesh Nair, Member (Judicial)

Hon'ble Shri C J Mathew, Member (Technical)

Date of hearing : 08.02.2018

Date of decision : 05.06.2018

ORDER No: **A/86605/2018**

Per: C J Mathew

Appeal of Revenue against order-in-appeal no. AGS (184) 72/090 dated 11th August 2009 of Commissioner of Central Excise & Customs (Appeals), Aurangabad is limited to the setting aside of penalty of `35,82,504 on M/s Crompton Greaves Ltd under section 11AC of Central Excise Act, 1944. The original authority had, in addition, confirmed recovery of differential duty of `35,82,504 under section 11A of Central Excise Act, 1944 for the period from 2004-05 to 2007-08 with attendant interest liability under section 11AB of Central Excise Act, 1944.

2. The duty liability is not in dispute and respondent had discharged that between February 2008 and June 2008 before issue of show cause notice in November 2008. The impugned order has upheld the charging of interest and there is no challenge to that by the assessee.

3. The backdrop to this dispute is worth a visit. Assessee manufactured 'electrical stamping' and during the relevant period transferred goods to its sister unit by discharging duty liability, as prescribed in rule 8 of Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000, at 110% of cost of production as certified in CAS-4. The jurisdictional officers averred that rule 7 of the said

Rules were applicable mandating resort to provisional assessment as prescribed therein for payment of the differential duty at the intervals prescribed therein. This failure to comply with the appropriate valuation mechanism was held as short-payment of duty with deliberate intent to evade by misrepresentation leading to the recovery of duty, along with interest, and the imposition of penalty.

4. Assesseees are required to resort to rule 7 of the said Rules when the final value to be recovered is not known at the time of clearance. Admittedly, the respondent did not seek provisional assessment but paid the differential duty as soon as the liability was made known. Before the lower authorities, they pleaded that there was no intent to evade duty as is evident from payment thereof and their not having gained any advantage by not following the provisions of rule 7 of the said Rules entailing them to discharge of the differential duty on annual basis.

5. Learned Authorized Representative contends that entitlement to credit by the receiving unit does not condone the responsibility to resort to provisional assessment and discharge of duty differential at periodic intervals. It was also submitted that compliance upon being caught out does not don the assessee with a halo of sanctity. Reliance is placed on the decision of the Tribunal in *Kubo Combustion Efficiency Chem P Ltd v. Commissioner of Central Excise*,

Raigad [2008 (225) ELT 391 (Tri-Mumbai)], and of the Hon'ble Supreme Court in *Commissioner of Central Excise, Mumbai v. Mahindra & Mahindra Ltd [2005 (179) ELT 21 (SC)]* and in *Dharampal Satyapal v. Commissioner of Central Excise, New Delhi [2005 (183) ELT 241 (SC)]*.

6. Learned Counsel places reliance on the decisions of the Larger Bench of the Tribunal in *Jay Yuhshim Ltd v. Commissioner of Central Excise, New Delhi [2000 (119) ELT 718 (Tribunal-LB)]* and of the Tribunal in *Nirlon Limited v. Commissioner of Central Excise, Mumbai – V [2004 (117) ELT 836 (Tri-Mumbai)]* which _____ the Larger Bench and was upheld by the Hon'ble Supreme Court in an elaborate judgement in *Nirlon Ltd v. Commissioner of Central Excise, Mumbai [2015 (320) ELT 22 (SC)]*.

7. Before proceeding further, we take note of the decision in *re Nirlon Ltd* wherein the Hon'ble Supreme Court has held that

“9. We have ourselves indicated that the two types of goods were different in nature. The question is about the intention, namely, whether it was done with bona fide belief or there was some mala fide intentions in doing so. It is here we agree with the contention of the learned Senior Counsel for the appellant, in the circumstances which are explained by him and recorded above. It is stated at the cost of repetition that when the entire exercise was revenue neutral, the appellant could not have achieved any purpose to evade the duty.

10. Therefore, it was not permissible for the respondent to invoke the proviso to Section 11A(1) of the Act and apply the extended period of limitation. In view thereof, we confirm the demand insofar as it pertains to show cause notice dated 25-2-2000. However, as far as show cause notice dated 3-3-2001 is concerned, the demand from February, 1996 till February, 2000 would be beyond limitation and that part of the demand is hereby set aside. Once we have found that there was no mala fide intention on the part of the appellant, we set aside the penalty as well."

8. The decisions cited by Learned Authorized Representative relate to dispute over the recovery of differential duty. In the present appeal, the differential duty is not in question. The attempt by Revenue to cast aspersions on the tame compliance is counterproductive, to say the least. The law does not pretend to specify when the extended period can unerringly be invoked along with attendant penalties. On the contrary, it is clear from the various judicial pronouncements cited by the rival sides that intent to evade duty is ascertainable only from the facts and circumstances of each case. A single fitment to all disputes by bringing case laws on record is of little avail.

9. Assessee does not deny duty liability and has paid the dues well before issue of notice. They also made it clear that the erstwhile practice had the approval of Joint Director (Cost); a subsequent enlightenment cannot lay blame at the door of the assessee. The submission of the assessee that the method of assessment and quantum of liability does not

impact them cannot but be taken note of. The supplier and receiver are the same; a detriment to one is a gain to the other. That revenue neutrality does not accord the right to escape taxes is not in doubt; however, with taxes liability having been discharged, it can certainly support a plea of want of intent to evade. All that occurred is that this neutrality has been cited to demonstrate the indifference to the different modes of assessment. Intent to evade duty is not a fruit of indifference but of active obfuscation. We, therefore, find no reason to disbelieve the contention of the respondent.

10. Consequently, the penalties set aside in the impugned order cannot be revived. Appeal of Revenue is dismissed.

(Pronounced in Court on)

(Ramesh Nair)
Member (Judicial)

(C J Mathew)
Member (Technical)