



1

A.F.R.
Reserved

Court No. - 33**Case :-** CENTRAL EXCISE APPEAL No. - 228 of 2010**Appellant :-** M/S Continental Cement Company**Respondent :-** Union Of India & Others**Counsel for Appellant :-** Praveen Kumar,Ashok Kumar,Uma Nath Pandey**Counsel for Respondent :-** R.C.Shukla.,S.C.**With****Case :-** CENTRAL EXCISE APPEAL DEFECTIVE No. - 126 of 2010**Appellant :-** Ajit Kumar**Respondent :-** State Of U.P. & Ors.**Counsel for Appellant :-** Ashok Kumar,Krishna Agrawal,Praveen Kumar**Counsel for Respondent :-** R.C.Shukla**With****Case :-** CENTRAL EXCISE APPEAL No. - 528 of 2011**Appellant :-** Jagmohan Goel**Respondent :-** Union Of India And Others**Counsel for Appellant :-** Krishna Agrawal**Counsel for Respondent :-** R.C. Shukla**With****Case :-** CENTRAL EXCISE APPEAL No. - 529 of 2011**Appellant :-** Smt. Kamlesh Tayal, Ex-Director Of M/S Continental Cement Co**Respondent :-** Union Of India And Others**Counsel for Appellant :-** Krishna Agrawal**Counsel for Respondent :-** R.C. Shukla**Hon'ble Tarun Agarwala,J.****Hon'ble Dr. Satish Chandra,J.****(Delivered By:- Hon'ble Dr. Satish Chandra,J.)**

1. The present appeals are filed by the appellant/assessee against the order dated 8.9.2009 in Excise Appeal No.3407 of 2004 & 3408 of 2004 as well as the order dated 15.2.2010 passed in

applications No.206 & 207/2009 passed by Custom, Excise & Service Tax Appellate Tribunal, New Delhi.

2. The brief facts of the case are that the appellant/assessee is a private limited company and during the assessment year under consideration, was engaged in the manufacturing of ordinary Portland Cement, which was subject to Central Excise Act, 1985. The Department received an anonymous complainant indicating therein that during the period 9.2.1993 to 27.9.1995 about 3839.350 MT, ordinary Portland cement was illegally sold which involved central excise duty amounting to Rs.7,20,154/-, by using parallel documents like GPIs, invoices, challans, Bills, cash memo and GRs, etc.

3. After receiving the anonymous complainant along-with copy of the said documents, Department has issued notice to the appellants and finally confirmed the demand to the tune of Rs.7,20,154/- under the erstwhile Rule 9(2) of the Central Excise Rules, 1944 read with the proviso to sub section (1) of Section 11-A of the Central Excise Act and also imposed penalty to the tune of Rs.3,50,000/- under Rules 9(2) and 173Q as the same stood at the relevant time read with Rule 209 of the Central Excise Act, 1944 also imposed penalty of Rs.7,20,154/- in terms of Section 11-A-C of the said Act. Besides penalty to the tune of Rs.3,65,000/-

under Rule 209 of the Central Excise Rules, penalty was also imposed against each of the Directors namely Shri Ajit Kumar, Shri Jagmohan Goel and Smt. Kamlesh Tayal. Being aggrieved, the respondents preferred appeal before the Commissioner (Appeals) which were allowed vide order dated 29.3.2004. Not being satisfied the Department has filed appeals before the Tribunal, who **ex parte** has allowed the appeals filed by the Department. The recall applications were also rejected by the Tribunal. Being aggrieved the appellants-assessee have filed the present appeals.

4. The first appeal pertaining to quantum and remaining appeals are related the penalties levied against each Director/company.

5. With this background, heard Sri Ashok Kumar and Sri Uma Nath Pandey, learned counsel for appellant in Central Excise Appeal Nos.228 of 2010 and 126 (defective) of 2010; and Sri Krishna Agarwal the learned counsel for the appellant in Central Excise Appeal Nos.528 of 2010 and 529 of 2010. Sri R. C. Shukla, learned counsel for the department. All the appeals are interconnected, so the same are disposed of by this consolidated order for the sake of convenience.

6. Shri Ashok Kumar, learned counsel for the

assessee submits that there are three Directors in the company namely Sri Ajit Kumar, Shri Jagmohan Goel and Smt. Kamlesh Tayal. Earlier Sri Anil Kumar was also a Director, who was removed by the Board of Directors of the company, as he had hatched conspiracy against other Directors. Sri Anil Kumar was removed because he also has misappropriated funds with the help of Accountant Sri Vasts, who was also removed from service. In revenge, they have prepared the forged documents and made false complainant against the appellants. Parallel documents like GPIs, invoices, challans, Bills, cash memo and GRs, etc. were prepared by these persons to support anonymous complaint. On specific inquiry by the Bench, he accepts that the name of the informant was never disclosed by the Department.

7. He further submits Sri Ajit Kumar, one of the Director of the company was summoned by the Department and his statement was recorded where it was mentioned that his signature was forged on the said parallel documents. The documents have not been issued by his unit and the same have been prepared unauthorizedly and illegally by Sri Anil Kumar former Director of the company. He submits that no sale was made out side the books and the complaint was entertained after 4-5 years, which has no relevance. In the absence of any other

corroborative evidence of clandestine removal, penalty could not be imposed, on such singular ground specially without providing the physical production of goods and their clearance. Lastly, he made a request that impugned order passed by the Tribunal may kindly be set aside and restore the order passed by the first appellate authority.

8. Counsel for other appellants have accepted these arguments.

9. On the other hand Sri R. C. Shukla, learned counsel for department justified the impugned order passed by the Tribunal. He submits that on the basis of the anonymous complainant received by the Department, so called Buyer M/s Singhal Cement Agency, Khatauli was summoned. The proprietor of the said firm namely, Shri Ram Bhikari Singhal made a statement that the firm had been closed since last one year and he is running a petrol pump, but on the basis of memory, he told that 15M.T. of cement contained in 300 bags had been received by his firm on 6.1.1994 against challan No.705 dated 6.1.1994 through Truck No. UTX-4397 and cash payment of Rs.27,900/- was made by his firm. Similarly, M/s Praveen Cement Agency, Village-Badsoo, District Muzaffarnagar was summoned, the proprietor of the said firm Shri Praveen made a statement that his

firm was closed since last four years and now he is dealing in business of shoes. On the basis of memory he told the officer that 7.5. M.T. of cement contained in 150 bags had been received at his firm on 25.8.1993 under challan No.460 dated 25.8.1993, through Truck No.UST 5613 and cash payment of Rs.13,800/- was made by his firm through a commission agent. The proprietor of M/s Taj Traders, Noorpur, District Bijnor, Shri Ayoob in his statement stated that he has received consignment against Billity Nos.4272 and 732, dated 26.9.1994 and 3.10.1994. Regarding other billities which were received along-with the anonymous complaint, he has declined his signature. Learned counsel also submits that all these buyers have accepted that the goods were sold by the appellants' company. Lastly, he justified the impugned order passed by the Tribunal. For the purpose, he placed reliance on the ratio laid down in the case reported as **2007(216) E.L.T. 660 (S.C.) Prakash Metal Works Vs. Collector of C. Ex., Ahmedabad.**

10. We have heard the learned counsel for the parties and gone through the material available on record, from which it appears that Shri Shubhashis Dev, Government Examiner of questioned documents, Shimla gave his written opinion dated 12.6.1998, wherein he has stated that "the

documents of this case have been carefully and thoroughly examined. The enclosed writings and signatures stamped and marked were all written by one and the same persons”.

11. From the above, it appears that all the documents were written by one and the same persons, though the dates and the name of the parties are different. When it is so then the genuineness of the documents cannot be accepted.

12. Further, unless there is clinching evidence of the nature of purchase of raw materials, use of electricity, sale of final products, clandestine removals, the mode and flow back of funds, demands cannot be confirmed solely on the basis of presumptions and assumptions. Clandestine removal is a serious charge against the manufacturer, which is required to be discharged by the Revenue by production of sufficient and tangible evidence. On careful examination, it is found that with regard to alleged removals, the department has not investigated the following aspects:

- (i). To find out the excess production details.
- (ii). To find out whether the excess raw materials have been purchased.
- (iii). To find out the dispatch particulars from the regular transporters.

- (iv). To find out the realization of sale proceeds.
- (v). To find out finished product receipt details from regular dealers/buyers.
- (vi). To find out the excess power consumptions.

13. Thus, to prove the allegation of clandestine sale, further corroborative evidence is also required. For this purpose no investigation was conducted by the Department.

14. In the instant case, no investigation was made by the Department, even the consumption of electricity was not examined by the Department who adopted the short cut method by raising the demand and levied the penalties. The statement of so called buyers, namely M/s Singhal Cement Agency, M/s Praveen Cement Agency; and M/s Taj Traders are based on memory alone and their statements were not supported by any documentary evidence/proof. The mischievous role of Shri Anil Kumar erstwhile Director with the assistance of Accountant Sri Vasts cannot be ruled out.

15. In view of the above, we are of the opinion that when there is no extra consumption of electricity, purchase of raw materials and transportation payment, then manufacturing of extra goods is not possible. No purchase of raw material out side the books have been proved.

16. In the light of the above discussions and considering the totality of the case, we are satisfied that no case is made out for extra so called clandestine sale of the Portland Cement to the said parties. We are satisfied that the first appellate authority has rightly deleted the addition and cancel the penalties. Hence we hereby set aside the impugned order passed by the Tribunal and restore the order passed by the first appellate authority, alongwith the reasons mentioned herein.

17. In the result, all the appeals filed by the appellants are hereby allowed.

Order Date :- 02 / Sept. 2014
Dev/-

(Dr. Satish Chandra,J.) (Tarun Agarwala,J.)