* **THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment delivered on: 26.09.2011

\+ **CEAC 6/2007**

COMMISSIONER OF CENTRAL EXCISE, DELHI - I ..... APPELLANT

Vs

M/S KANDHARI RADIO CORPORATION & ORS. ..... RESPONDENTS

Advocates who appeared in this case:
For the Appellant: Mr Mukesh Anand, Advocate
For the Respondents: Mr Naveen Mullick, Advocate

CORAM :-
HON'BLE MR JUSTICE SANJAY KISHAN KAUL
HON'BLE MR JUSTICE RAJIV SHAKDHER

1. Whether the Reporters of local papers may be allowed to see the judgment ?
2. To be referred to Reporters or not ? Yes
3. Whether the judgment should be reported in the Digest ?

RAJIV SHAKDHER, J

1. The captioned appeal, which has been filed by the revenue, impugns the order of the Customs Excise Service Tax Appellate Tribunal (hereinafter referred to as the 'Tribunal') dated 02.12.2005. The Tribunal has passed a common order in five (5) appeals. Out of the five (5) appeals, four (4) appeals had been preferred by the following entities: i.e., M/s Kandhari Radio Corporation (in short 'KRC'), M/s Jeet Enterprises (in short 'Jeet'), M/s Hi-Tech Electrical Industries (in short 'Hi-Tech') and M/s Kandhari Separator Industries (in short 'KSI'). The four (4) appeals filed by them bear numbers

E/24-27/02. The fifth (5th) appeal was that of the revenue, which bears the number E/164/02.

2. The appeals before the Tribunal were preferred against a common order dated 24.09.2001, passed by the Commissioner of Central Excise (Appeals) [hereinafter referred to as 'Commissioner (Appeals)']. The Commissioner (Appeals) by order dated 24.09.2000 disposed of by a common order two separate appeals against two (2) separate orders passed by the adjudicating authority (i.e., the Additional Commissioner) in order-in-original numbers 86/2000 and 87/2000. Both orders were passed by the adjudicating authority on the same date i.e., 17.11.2000.

3. In order to decide the captioned appeal the following brief facts are required to be noticed. Information was received by the revenue that KRC was manufacturing chargeable accumulators falling under Central Excise Tariff Heading No. 8507, which was being evidently cleared without obtaining central excise registration. Consequently, the Anti-Evasion Branch of the Central Excise Commissionerate conducted a search on the premises of the KRC located at B-103, Naraina Industrial Area, Phase-I, New Delhi. Search was also carried out simultaneously at the office premises, as also, the residential premises of the partner of KRC, Avtar Singh. During the search it got revealed that all four units, i.e., Jeet, Hi-Tech, KSI and KRC were located at B-103, Naraina Industrial Area,

Phase-I, New Delhi. It further came to light that goods in issue, which were manufactured at the said factory premises, were cleared under the brand name 'KRC'. Consequently, goods valued at Rs 99,950/- were seized under a proper punchnama in respect of which a show cause notice was issued albeit at a subsequent date, i.e., 12.01.1999. During the search, records and documents were also resumed. Inquiries were conducted both with the transporters and the customers of the aforementioned entities, i.e., KRC, Hi-Tech, Jeet and KSI. Statements of the persons controlling the affairs of the client entities as well as Avtar Singh, who was the common entity managing and controlling KRC, KSI, Hi-Tech and Jeet, were also recorded.

4. Pursuant to the aforesaid, three separate show cause notices were issued of even date qua Hi-Tech, KSI and Jeet. All three show cause notices were dated 25.02.2000. The details with respect to the said show cause notices, in respect of the duty demanded, is as follows:

Name of the party	SCN dated	Duty Demanded
M/s Hi-Tech	25.02.2000	4,60,188/-
M/s KSI	25.02.2000	6,87,509/-
M/s Jeet Enterprises	25.02.2000	7,72,204/-

5. Upon opportunity being given the adjudicating authority

sustained the demand raised in the aforementioned show cause notices and imposed penalty equivalent to the duty demanded under the provisions of Section 11AC of the Central Excise Act, 1944 (in short 'C.E. Act'). Interest under Section 11AB was also levied. Furthermore, personal penalty in the sum of Rs 10,000/- was imposed in all 3/4 cases. The adjudicating authority passed three separate orders-in-original, the details with respect to which are as follows:

Name of the party	Order-in-original no. & date
M/s Hi-Tech	85/2000, 13.11.2000
M/s KSI	86/2000, 17.11.2000
M/s Jeet Enterprises	87/2000, 17.11.2000

5. Against the said orders-in-original appeals were filed with the Commissioner (Appeals), details of which are as follows:

S. No.	Appeal No.	Name & Address of the Appellant
1	119/2001	M/s Jeet Enterprises, 103, Naraina Industrial Area, Phase-I, New Delhi (hereinafter referred to as the Appellant No. 1)
2	120/2001	Shri Avtar Singh, 103, Naraina Industrial Area, Phase-I, New Delhi (hereinafter referred to as the Appellant No. 2)
3	121/2001	M/s Kandhari Separator Industries, 103, Naraina Industrial Area, Phase-I, New Delhi (hereinafter referred to as the Appellant No. 3)
4	122/2001	Shri Avtar Singh, 103, Naraina Industrial Area, Phase-I, New Delhi (hereinafter referred to as the Appellant No. 4)

6. The aforementioned appeals were disposed of by a common order by the Commissioner (Appeals) dated 24.09.2001. By this order the Commissioner (Appeals) concluded as follows:

> *"6.7 Admittedly, the show cause should have been served on M/s Kandhari Radio Corporation, demanding duty from them under Section 11A, particularly in the circumstances when the showcause notice for seizure was given to them. The others should have been only notices for penal action under Rule 209A as the brand name belongs to M/s KRC. By some strange coincidence, KRC were not even made noticees whereas they should have been so in terms of Rule 9 and Rule 49 which bind them for payment of duty on all goods leaving their factory premises. However, with Shri Avtar Singh being a noticee in both the notices, the damage has been contained to a large extent. With KRC being considered as the manufacturers, they would also be the beneficiaries of the exemption notification NO. 1/93 earlier being denied to them through this manipulation. I, accordingly, am clubbing the so called production/ clearance made by the separate units, namely, M/s Kandhari Separator Industries, M/s Jeet Enterprises and M/s Hi-TeK taking them as the clearances effected by M/s Kandhari Radio Corporation.*
>
> *6.8 Shri Avtar Singh, who was in control of everything and functioned as Managing Partner for M/s Kandhari Radio Corporation and others also, again came to submit certain records on 11.09.2001. He made a submission that he was prepared to pay duty chargeable over the exemption limit.*

6.9 From the above discussion, I hold that M/s KRC should be treated as the manufacturers. The condition of the SSI availment as per the Notification No. 1/93 should be applied to the total value of the goods manufactured and cleared by them in the relevant financial year. They shall be entitled to the normal SSI exemption for duty free clearance upto the value of Rs 30 lacs or more as admissible in a given financial year and above that the goods have to suffer duty. Accordingly, the duty payable is worked out as under:-

Period	*Value Rs.*	*Exemption Limit Rs.*	*Effective Duty Rate %*	*Total Duty Rs.*
3/95	*1,16,930/-*	*30,00,000/-*	*Nil*	*Nil*
95-96	*47,99,080/-*	*30,00,000/-*	*10%*	*1,79,908/-*
96-97	*45,22,551/-*	*30,00,000/-*	*10%*	*1,52,255/-*
97-98	*43,53,523/-*	*30,00,000/-*	*03%*	*40,606/-*
Total Duty Liability Comes to				*Rs. 3,72,760/-*

As the period for which the duty liability arises is the financial years 95-96 to 97-98, penalty under Section 11AC is applicable only for a limited period, i.e., 1996-97 and 1997-98. Although the same came into effect from 28.09.1996, yet the duty demanded for the financial year 1996-97 falls fully within the purview of Section 11AC as the earlier part of the year is covered by the exemption limit. Thus, the penalty under Section 11AC read with Rule 173Q would get reduced substantially. I propose to reduce the said penalty under Section 11AC red with Rule 173Q to Rs 2,25,000/- against a duty liability of Rs

3,72,769/- which is to be deposited individually severally by the units/ partners. (It is noted that for the purposes of mandatory penalty under Section 11AC, the amount of duty not paid for the period 1996 to 1998 is the main consideration.)

6.10 Shri Avtar Singh in any case is concerned as dealing in the goods on which the duty was payable but was not paid. Since he is a partner not separate from the partnership firm, no separate penalty under Rule 209A is warranted against him.

6.11 It has been brought out that a pre-deposit of Rs 50,000/- has been made in the case by Shri Avtar Singh on behalf of M/s Kandhari Radio Corporation. It is directed that the above amount shall be adjusted against the total duty liability as re-determined here-in-before."

7. As noticed right at the beginning of our judgment, five appeals were preferred, one by the revenue and four others by the entities referred to above, i.e., Hi-Tech, Jeet, KRC and KSI. The Tribunal by the impugned order has allowed the appeal of Hi-Tech, Jeet, KRC and KSI, while the revenue's appeal has been dismissed.

8. In support of the captioned appeal, we have heard Mr Mukesh Anand for the revenue, while on behalf of respondents Mr Navin Mullick advanced arguments. Mr Anand has argued that the Tribunal's observation that since no show cause notice was served on KRC and hence liability could not be fastened on it, was not sustainable in view of the fact that at the stage of seizure of goods a show cause notice dated 12.01.1999 had been issued. He further

submitted that Avtar Singh being the common thread in respect of the four (4) entities, i.e., Hi-Tech, Jeet, KRC and KSI, there was sufficient notice and hence, the provision of Section 11A of the C.E. Act had been complied. In these circumstances, Mr Anand submitted that the reason supplied by the Tribunal for allowing the appeals of the said four entities, i.e., Hi-Tech, Jeet, KRC and KSI are not sustainable. Mr Anand also submitted that the Tribunal did not deal with that part of their grievance made before it that the Commissioner (Appeals) could not have clubbed the production/ clearances made by KSI, Jeet and HI-Tech in the hands of KRC. It is submitted that this aspect, which had been raised by the revenue in its appeal, had not been addressed by the Tribunal.

9. On the other hand, learned counsel for the respondents submitted that the provisions of Section 11A of the C.E. Act were mandatory and the revenue not having served a show cause notice on KCR no liability could be fastened on it. In support of this submission reliance was placed on the judgment of the Supreme Court in the case of Metal Forgings vs UOI 2002 (146) E.L.T. 241 (SC). The learned counsel also referred to the provisions of Rule 233A of the Central Excise Rules, 1944 to buttress his point that no confiscation of property or imposition of penalty on any person can take place unless a show cause notice was issued and a reasonable opportunity was given of making a representation in writing as to

why property ought not to be confiscated or penalty imposed, followed by a hearing in the matter. Learned counsel submitted that since the show cause notice admittedly was not issued, the demand against KRC could not be sustained.

10. Having heard the learned counsels for the parties, we are of the view that in so far as the issue raised in the appeal filed by KRC, that no liability could be fastened on it as a show cause notice was not issued, is an issue which will have to be found in favour of the respondent. The reason is that the provisions of Section 11A of the C.E. Act are mandatory in nature, as held by the Supreme Court in Metal Forging (supra). The relevant observations in this regard are contained in paragraph 10 at page 245 of the judgment. For the sake of convenience the same are extracted hereinbelow:

> *"....10. It is an admitted fact that a show cause notice as required in law has not been issued by the revenue. The first contention of the revenue in this regard is that since the necessary information required to be given in the show cause notice was made available to the appellants in the form of various letters and orders, issuance of such demand notice in a specified manner is not required in law. We do think that we cannot accede to this argument of the learned counsel for the revenue. Herein we may also notice that the learned Technical Member of the tribunal has rightly come to the conclusion that the various documents and orders which were sought to be treated as show cause notices by the appellate authority are inadequate to be treated as show cause notices contemplated under Rule 10 of the Rules or Section 11A of the Act.*

Even the Judicial Member in his order has taken almost a similar view by holding that letters either in the form of suggestion or advice or deemed notice issued prior to the finalisation of the classification cannot be taken note of as show cause notices for the recovery of demand, and we are in agreement with the said findings of the two Members of the tribunal. This is because of the fact that issuance of a show cause notice in a particular format is a mandatory requirement of law. The law requires the said notice to be issued under a specific provision of law and not as a correspondence or part of an order. The said notice must also indicate the amount demanded and call upon the assessee to show cause if he has any objection for such demand. The said notice also will have to be served on the assessee within the said period which is either 6 months or 5 years as the facts demand. Therefore, it will be futile to contend that each and every communication or order could be construed as a show cause notice. For this reason the above argument of the revenue must fail…."

(emphasis is ours)

11. As regards other aspect of the matter, which is, whether the Commissioner (Appeals) could have directed clubbing of clearances made by KSI, Jeet and Hi-Tech in the hands of KRC; is an aspect, which the Tribunal in our view has not dealt with. It is important to note the net effect of the order passed by the Commissioner (Appeals) was broadly that even though show cause notice ought to have been served on KRC, the fact that it was not served was saved, by virtue of Avtar Singh being a common thread in respect of the

aforementioned entities. The Commissioner (Appeals) thus proceeded to club the clearances of KSI, Jeet and Hi-Tech in the hands of KRC. The Commissioner (Appeals) also directed that since KRC was considered as the manufacturer of the goods in issue, it would get the benefit of the SSI exemption notification number 1/1993. Based on this the duty, for the period March, 1995 to 1998, in the sum of Rs 3,72,760/- was calculated. A penalty was imposed under Section 11AC read with Rule 173Q, in the sum of Rs 2,25,000/- against duty liability of Rs 3,72,760/-. In respect of penalty appellants were held jointly and severally liable. As far as Avtar Singh was concerned, the Commissioner (Appeals) observed that since he was a partner no separate penalty could be imposed on him under Rule 209A. The sum of Rs 50,000/- paid in the form of pre-deposit by Avtar Singh on behalf of KRC was also directed to be adjusted against total duty liability as re-determined by him. In the aforesaid circumstances, it was incumbent on the Tribunal to decide as to whether the Commissioner (Appeals) had erred in clubbing the production/ clearances in the hands of ERC.

12. This aspect of the matter as indicated hereinabove, did not receive the attention of the Tribunal. In these circumstances, we are of the opinion that while no question of law is required to be framed as regards the issue which is: whether the Tribunal was right in holding that no duty or penalty could be imposed on KRC on the

ground that a show cause notice was not issued to it? The Tribunal was certainly duty bound to examine the issue raised in the revenue's appeal as to whether the Commissioner (Appeals) could have clubbed the clearances of KSI, Jeet and Hi-Tech in the hands of KRC. In respect of this aspect, we set aside the order of the Tribunal and remand this issue to the Tribunal for appropriate orders in that regard. It is ordered accordingly. The appeal, accordingly, stands disposed of.

SANJAY KISHAN KAUL,J

RAJIV SHAKDHER, J

SEPTEMBER 26, 2011
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