(2014) 05 P&H CK 0703

High Court Of Punjab And Haryana At Chandigarh

Case No: CEA Nos. 72-79 and 87 of 2011 (O and M)

Commissioner of Central Excise	APPELLANT
Vs	
Mini Steel Traders	RESPONDENT

Date of Decision: May 19, 2014

Acts Referred:

- Central Excises and Salt Act, 1944 - Section 35G

Citation: (2014) 309 ELT 404

Hon'ble Judges: Jaspal Singh, J; Ajay Kumar Mittal, J

Bench: Division Bench

Advocate: Sukhdev Sharma, Advocate for the Appellant; Sudeep Singh, Deepak Gupta, Jagmohan Bansal and Ish Puneet Singh, Advocate for the Respondent

Judgement

@JUDGMENTTAG-ORDER

Ajay Kumar Mittal, J.
This order shall dispose of Central Excise Appeal Nos. 72 to 79 and 87 of 2011 as learned counsel for the parties are agreed that common question of law is involved in all the appeals. However, the facts are being extracted from CEA No. 72 of 2011 (2011 (264) E.L.T. 535 (Tribunal)). CEA No. 72 of 2011 has been preferred by the revenue under Section 35G of the Central Excise Act, 1944 (in short, "the Act") against the order dated 16-11-2010, Annexure A. 4 passed by the Customs, Excise and Service Tax Appellate Tribunal, New Delhi, (in short, "the Tribunal") in Central Excise Appeal No. E/207/2009-SM(BR), claiming following substantial question of law:-

"Whether setting aside penalty on the registered dealers, who have facilitated others in taking fraudulent Cenvat credit by issuing invoices without actual supply of goods, on the ground that the sub-rule (2) to Rule 26 of Central Excise Rules, 2002 was inserted only w.e.f. 1-3-2007 vide Notification No. 8/2007-C.E. (N.T.), dated 1-3-2007 is legally correct especially when such penalty was imposable under Rule

26 of the said Rules prior to its amendment as otherwise it would imply that for technical/procedural lapses, the registered dealers would have been liable for penalty prior to 1-3-2007 and not for the frauds committed by them?"

2. A few facts relevant for the decision of the controversy involved, as narrated in CEA No. 72 of 2011 may be noticed. On 30-6-2002, the staff of Central Excise Division, Mandi Gobindgarh visited the factory premises of M/s. A.R. Alloys, Nasrauli Road, Mandi Gobindgarh. No stock of duty paid scrap was found against recorded balance. A partner of the firm stated that since April, 2002, they had taken Cenvat credit on invoices issued by M/s. Minni Steel Traders without receiving any material with the invoices. The proprietors of Minni Steel and Minni Ispat, Mandi Gobindgarh admitted having issued invoices to A.R. Alloys without supplying any material. During further investigation, Mr. Anil Kumar Singla, proprietor of M/s. I.S. Steel and Agro Industries, Mandi Gobindgarh admitted having issued invoices to Minni Ispat without supplying the material. He also admitted that he had closed down his manufacturing activity in March, 2002 and that inputs purchased from manufacturers were sold in the market but their receipt was shown in the records and Cenvat credit was availed thereon. To square up the accounts, he had shown production in his records. He also stated that except in some cases, he had issued invoices only without supplying the material and in some cases he had supplied material purchased from local market along with his own invoices. He further admitted having taken Cenvat credit of Rs. 10,14,979.60 on the inputs without undertaking any manufacturing activity and further passed Cenvat credit of Rs. 7,85,403/- by issuing sale invoices of melting scrap. Show cause notice dated 26-2-2007, Annexure A. 1 was issued to the respondent. The case was adjudicated and the adjudicating authority confirmed the demand of duty from the manufacturer of final products and imposed varying penalties upon the manufacturers and dealers vide order dated 29-2-2008, Annexure A. 2 Aggrieved by the order, all the parties filed appeals before the Commissioner (Appeals). Vide order dated 31-10-2008, Annexure A. 3, the Commissioner (Appeals) dismissed the appeals of the manufacturers of final products challenging the demand of duty and penalties imposed but allowed the appeals of the respondent-assessees and set aside the penalties imposed. Feeling aggrieved, the revenue filed appeals before the Tribunal. Vide order dated 16-11-2010, Annexure A. 4, the Tribunal dismissed the appeals on the ground that where a person merely arranges modvatable document to the manufacturer without actual delivery of goods, penalty could not be imposed under Rule 209A of the Rules. Hence the instant appeals by the revenue.

3. Learned counsel for the revenue submitted that the Tribunal had erroneously upheld the cancellation of the penalty whereas in view of the decision of this Court in Vee Kay Enterprises Vs. Commissioner of Central Excise, , the same was leviable.

4. On the other hand, learned counsel for the respondent-assessees in all the cases, besides supporting the impugned orders passed by the Commissioner (Appeals)

and the Tribunal, relied upon judgment of this Court in CEA No. 56 of 2009 Commissioner of Central Excise Commissionerate, Chandigarh v. Shri Ashish Gupta, decided on 18-2-2010 to contend that the Commissioner (Appeals) and the Tribunal had rightly deleted the penalty. It was urged that the provision of sub-rule (2) to Rule 26 of the Central Excise Rules, 2002 (in short, "the Rules") was inserted w.e.f. 1-3-2007 vide Notification No. 8/2007-C.E. (N.T.), dated 1-3-2007 and, thus, it could not be made applicable to the proceedings prior thereto. Judgment in Vee Kay Enterprises''s cases (supra) was sought to be distinguished by urging that though this Court had held in favour of the assessee regarding non-applicability of Rule 26(2) of the Rules prior to 1-3-2007, the issue therein was whether Rule 25(1)(b) and 25(1)(d) of the Rules were applicable or not. It was argued that in the light of the findings recorded by the Commissioner (Appeals) that the present case was not covered under Rule 25(1)(b) of the Rules, the revenue cannot derive any benefit from the said pronouncement.

5. After hearing learned counsel for the parties, we do not find any merit in these appeals.

6. This Court in Ashish Gupta and Vee Kay Enterprises''s cases (supra) had held that Rule 26(2) of the Rules by virtue of which an assessee was held liable for penalty where invoices were issued without any movement of goods, was inserted by notification dated 1-3-2007 which was not applicable to alleged acts committed prior to the said date. Further, in view of the findings recorded by Commissioner (Appeals) to the effect that Rule 25(1)(b) of the Rules was not attracted to the facts of the present case, the aforesaid judgment does not advance the case of the revenue. However, the Commissioner (Appeals) and the Tribunal on facts deleted the penalty. The findings of the Commissioner (Appeals) while deleting the penalty read thus:

"14. I have gone through the relevant provisions of the law. The fact is that excisable goods were never manufactured. Rule 25(1)(b) of the Cenvat Credit Rules, 2002 provides penalty for non-accountal of excisable goods, liable to confiscation, produced or manufactured or stored by any producer, manufacturer, registered person of a warehouse or registered dealer. Under Rule 13(2) of the Cenvat Credit Rules, 2002 penalty is imposable for fraudulent taking/utilization of Cenvat credit with intention to evade payment of duty. In the present case no excisable goods, liable for confiscation, have been manufactured or produced. Provisions of Rule 13(2) and Rule 25(1)(b) of Central Excise Rules, 2002 are not attracted.

15. I also find that penal provisions for facilitating others in taking credit or issuance of invoices without actual supply of material has been inserted w.e.f. 1-3-2007 by inserting sub Rule (2) to Rule 26 of the Central Excise Rules with the issue of Notification No. 8/2007-C.E. (N.T.), dated 1-3-2007. Thus during the relevant period there was no legal provisions for imposition of penalty for such offences. Therefore, penalties imposed upon the appellant Nos. 1, 2, 3, 5, 7, 8, 10, 11 and 17 do not sustain and are set aside."

7. On further appeal by the revenue, the Tribunal confirmed the deletion of penalty with the following observations:-

"7. I have carefully considered the submissions from both sides and perused the records. As per the show cause notice, M/s. I.S. Steel & Agro Industries have not undertaken any manufacturing activity and therefore, the question of their supplying any goods does not arise. Apparently the said party was only a manufacturer on paper. Therefore, the transactions between the said manufacturer and the respondents-dealers, are only paper transactions without actual movement of goods. On these grounds, the original authority held that the concerned manufacturers of final products who have taken Cenvat credit based on invoices, are not eligible for Cenvat credit and also imposed penalties on them. The order of the original authority was upheld by the Commissioner (Appeals). Of course there is no appeal by any of the said manufactures of final products before me. Therefore, it emerges that there were no goods manufactured, sold or transferred. It is not the case of diversion of duty paid goods in one direction and invoices moving in another direction unlike in the case of V.K. Enterprises v. CCE, Panchkula cited supra. In the case of V.K. Enterprises, the duty paid goods have moved in one direction having been diverted and only the invoices moved in another direction. The dealers therein were held to have dealt with the goods knowingly and that the goods were held liable for confiscation. In the present case, as there are no goods, question of rendering any goods liable for confiscation does not arise. By Notification No. 8/2000, dated 1-3-2007 issue of such invoices without supply of the goods also attract penal provisions. Prior to that, there is no provision for imposing penalty for merely dealing with the invoices. This may attract penal action under other Acts. The Hon''ble High Court in the case of CCE, Chandigarh v. Ashish Gupta considered the following question of law:
''(i) When it has been proved in the investigations that a person has facilitated the other parties in evading Central Excise Duty, by fraudulently facilitating Modvat credit by supplying/endorsing gate passes without actual supply of impugned duty paid goods, whether penalty is imposable on such person under Rule 209A of Central Excise Rules, 1944 or not?''

The decision of the Hon''ble High Court also took note of the fact that the revenue has filed appeals where no penalty was imposed on persons who issued invoices without delivery of the goods prior to amendment of sub-rule (2) of Rule 26 of the Central Excise Rules, 2002. After considering the above question of law, it has been held that where a person merely arranges Modvatable document to the manufacturer without actual delivery of goods, penalty could not be imposed under Rule 209A. Rule 26(2) of Central Excise Rules, 2002 prior to amendment on 1-3-2007 is akin to Rule 209A. Therefore, the decision of the Hon''ble High Court will apply to the facts of the present case."

8. Learned counsel for the appellant has not been able to show any illegality or perversity in the orders passed by the Commissioner (Appeals) and the Tribunal in deleting the penalties imposed. Accordingly, the substantial question of law is answered against the revenue. Consequently, finding no merit in these appeals, the same are hereby dismissed.