CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, WEST ZONAL BENCH : AHMEDABAD

REGIONAL BENCH - COURT NO. 3

Excise Appeal No. 10018 of 2019

[Arising out of Order-in-Appeal No -CCESA-AUDIT-SRT-VK-165-2017-18 dated -26/09/2018 passed by Commissioner (Appeals) Commissioner of Central Excise, Customs and Service Tax-SURAT-I]

Shah Foils Ltd. **.... Appellant**

1820/1, Santej Khatraj Road, Opp. Raj Nagar Bus
Stop, Near Geb Sub Station, Santej, Taluka - Kalol,
GANDHINAGAR,
GUJARAT

VERSUS

Commissioner of Central Excise & Service Tax, Daman ....Respondent

3RD FLOOR...ADARSH DHAM BUILDING, VAPI-DAMAN
ROAD, VAPI
OPP.VAPI TOWN POLICE STATION,
VAPI
GUJARAT, 396191

WITH

(1) Excise Appeal No. 10019 of 2019 (Shri Kartik Shah)
(2) Excise Appeal No. 11968 of 2018 (Shah Foils Limited)
(3) Excise Appeal No. 11973 of 2018(Shah Foils Limited)

APPEARANCE :

Shri Ishan Bhatt, Advocate for the Appellant
Shri Gobind Jha with Shri Sanjiv Kinker, Superintendents (AR) for the Respondent

CORAM: HON'BLE MR. RAMESH NAIR, MEMBER (JUDICIAL)

FINAL ORDER NO. A/10868-10871 / 2020

DATE OF HEARING : 03.03.2020
DATE OF DECISION: 18.03.2020

RAMESH NAIR

In the present case, common issue involved is that whether the appellants are liable for penalty under Rule 26 for the alleged offence that they have issued Cenvatable invoice to various customers without supplying of goods.

2. Shri Ishan Bhatt, learned counsel appearing on behalf of the appellant submits that these cases were made out on the basis of common investigation conducted by DGCEI. All the statements and, particularly, a 'bill conditioning ledger'

which was recovered and on that basis, case of clandestine removal of goods by M/s Shah Foils ltd. was made and on the same evidence, the present case was also made. This Tribunal in the main case of clandestine removal, dropped the proceeding by judgment reported at Shah Foils Ltd. vs CCE 2019 (1) TMI 1162-CESTAT, Ahmedabad. This Tribunal's judgment was upheld by Hon'ble High Court of Gujarat reported at CCE vs. Shah Foils Ltd. 2020 (1) TMI 802 Gujarat High Court. He further submits that under the same investigation in the case of identically placed parties, i.e. Sun Textile Engineering Vs CCE vide order no. A/12157-12158/2019 dated 07/11/2019 Tribunal has set aside the order appealed against and allowed the appeal. It is his submission that since the Tribunal has not considered the evidence sufficient to establish the charge against the present appellant as well as other parties in the aforesaid judgment. this case being raised on the same evidence will also not stand. He also placed reliance on the following judgments:

1. Tahnee Heights Co-op, Housing Society Ltd. vs UOI 2015 (40) STR 453 (Bom.)
2. Commissioner vs Dhruv Dyesuff Pvt Ltd. 2016 (339) ELT A 131 (Guj.)
3. CCE vs Kuber Tobacco India Ltd. 2016 (338) ELT 113 (T)
4. Jindal Drugs Pvt. Ltd. vs UOI 2016 (340) ELT 67 (P&H)
5. Dhakad Metal Corporation Vs CCE 2015 (330) ELT 561 (T)
6. Steel Tubes of India vs CCE 2007 (217) ELT 506 (Tri- L.B.)
7. M.N. Shah vs CCE 2005 (187) ELT 321 (T)
8. Woodmen Industries vs CCE 2004 (164) ELT 339 (T) Affirmed by Supreme Court of India 2004 (170) ELT A 307 (SC)
9. Ashish Maheshwari vs CCE 2010 (252) ELT 96 (T)
10. Homang India Pvt. Ltd. vs CCE 2017 (357) ELT 1194 (T)
11. Prompt Castings Pvt. Ltd. vs CCE 2012 (284) ELT 641 (Cal.)

3. Shri Gobind Jha, learned Superintendent (Authorised Representative) appearing on behalf of the Revenue reiterates the findings of the impugned order. He relied on the following judgments:

1. Ajay Kumar G. Baheti vs Commr. of C. Ex. & Cus., Nashik 2017 (348) E.L.T. 115 (tri- Mumbai)
2. Naresh Agarwal vs CCE & S.T.- Vadodara-ii vide Tribunal's order no. A/10567/2020 dated 27/02/2020
3. Vee Kay Enterprises vs Commissioner of Central Excise 2011 (266) E.L.T. 436 (P&H)

4. MTC Business Pvt. Ltd. vs Commissioner of Customs, Mumbai 2015 (330) E.L.T. 570 (Tri- Mumbai)
5. Madhumilan Syntex Ltd vs UOI 2007 (210) E.L.T. 484 (S.C)
6. M.N. Dastur and Co. Ltd. vs UOI 2006 (4) S.T.R 3 (Cal.)

4. I have heard both sides and perused the records. I find that since, undisputedly, all the evidences relied upon in the present case were already considered by this Tribunal in the case of Shah Foils Ltd. and Sun Textiles Engineering (supra). Therefore, there is no need to again deal with all the common evidences such as pen drives recovered, documents recovered, etc. I find that in the present case, the only issue is related to imposition of penalty under Rule 26 against the appellant on the ground that they have fraudulently passed on the credit without supplying the goods. This Tribunal in the case of Shah Foils Ltd. (supra) dealt with the specific issue involved in the present case in para 25 of the above order, which is reproduced below:

25. As regard impugned Order-in-appeals passed by Commissioner (Appeals), Rajkot and Surat, we find that the impugned orders has relied upon the ledger "Bill condition" to hold that only bills were supplied without any actual delivery. Also the statements of the brokers and the intermediary dealers and buyers has been relied upon. The Appellant has pointed out that the findings are merely on basis of statements and without any support of documentary evidence. That merely on basis of records or papers of third party the allegation cannot be sustained. The Appellant has also relied upon the judgments in case of Dhruv Dyestuff Pvt. Ltd. 2016 (339) ELT A 131 and Kubber Tobaco India Ltd. 2016 (338) ELT 013 that for relying upon the statements the provisions of section 9D of the Central Excise Act has to be followed. He also relied upon the Tribunal order in case of Dhakad Metal Corporation 2015 (330) ELT 561 (TRI) that on the basis of confessional statement without corroborative evidence, the demands cannot be raised. That Shri Kartik Shah in his statement dt. 28.01.2014 and 29.01.2014 had clearly stated that the diversion of the goods, if any, may have occurred due to diversion of goods by broker of M/s SFPL and that all clearances made by them were under invoices. He has pointed out entries out of "Bill condition" ledger were of invoices in respect of which lorry receipts and Form no. 402 submitted to Gujarat Vat Department for movement of said goods is also available. He submits that the goods were always removed on invoice and the diversion took place later. We find that there is no physical/ material evidence of Appellant having issued invoice without accompanying goods. Only on the basis of pen drive seized from place outside the factory/ premises of Appellant and which itself is highly doubtful as discussed by us in foregoing paras, we are of the view that it cannot be said that the Appellant M/s SFL issued only invoices without actual clearances. We therefore hold that the impugned Orders-in-appeals in as much as it imposed penalty upon the Appellant under rule 26 (2) are not sustainable. We therefore set aside the impugned order in as much as it imposes penalty against the Appellants.

From the above finding, it is clear that the same issue has been considered in detail. The common evidence such as bill conditioning ledger, statements, etc were also considered. As the Tribunal has come to a conclusion that these evidences are not sufficient and accordingly, the charge of Shah Foils Ltd. that they have only issued the bills and not supplied the goods were not accepted by the Tribunal. The aforesaid judgment of the Tribunal was upheld by the Hon'ble Gujarat High Court. In the present case, there are various traders in whose name the Cenvatable invoices were issued. One of the traders, M/s Sun Textiles Engineering was also issued a Show Cause Notice making the present appellant as a co-noticee. The evidence in Sun Textiles Engineering case and in the present case were common. In the case of Sun Textiles Engineering (supra), this Tribunal has dropped the proceedings. The relevant order is reproduced below:

> *4. I have carefully considered the submission made by both the sides and perused the records. I find that the cenvat credit was denied to the appellant M/s Sun Textile Engineers and consequential penalty was imposed on M/s Shah Foils Ltd. by the learned Commissioner (Appeals) relying on various statements from which the Commissioner (Appeals) contended that M/s Shah Foils Ltd. only issued the invoices but the goods were not supplied. From the order of the original authority, it is observed that the adjudicating authority considered the submission of almost all the witnesses and came to the conclusion that in no any statements, there is a direct charge that M/s Sun Textile Engineer were not supplied the goods. It was held that statements do not have any probity value so far as the goods is related to M/s Sun Textile Engineers is concerned. The statements of suppliers and the buyer are not inculpatory and the statements of other persons are also not confessionals against M/s Sun Textile Engineers. It is also observed that the statement can be used only against those persons whose consignments the author of these statements were concerned with. However, there is no inculpatory statements as regard the transaction made between M/s Shah Foils Ltd. and M/s Sun Textile Engineers, therefore, the heavy reliance made by Learned Commissioner (Appeals) only on the statements is not correct. There is no dispute that the goods invoiced under eight invoices were transported and the same was received by M/s Sun Textile Engineer. The physical receipt of the goods have not been questioned in the entire case. The goods have been recorded in the books of M/s Sun Textile Engineers. The payment against the supplies were shown in the books, even though it is partly or otherwise. No investigation was carried out with M/s Sun Textile Engineer regarding the receipt of the goods, accounting in the books, use in the manufacture of final product and the clearance of final product on payment of duty, therefore, the said facts are not in dispute. Therefore, I am fully convinced with the findings given by the Learned Assistant Commissioner for dropping the demand. The finding given by the Learned Commissioner (Appeals) has no leg to stand accordingly, I am of the view that the impugned order is not sustainable, hence, I set aside the same. Appeals are allowed.*

From both the above decision, in the case which arose out of same evidence, therefore, in the present case also, the penalty imposed on the appellants will not sustain. Accordingly, the impugned orders only to an extent of imposition of penalty on the appellant under rule 26 are set aside. Appeals are allowed.

(Pronounced in the open court on 18.03.2020)

(Ramesh Nair)
Member (Judicial)

Diksha