

**Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench At Ahmedabad**

REGIONAL BENCH- COURT NO.3
Excise Appeal No. 644 of 2011

(Arising out of OIO-09/MP/VAPI/2011 dated 29/03/2011 passed by Commissioner of Central Excise, Customs and Service Tax-VAPI)

Steel & Metals Co

15, Brabourne Road,
Kolkatta, West Bengal

.....Appellant

VERSUS

C.C.E. & S.T.-Vapi

4th Floor...Adharsh Dham Building,
Opp. Town Police Station, Vapi-Daman Road, Vapi
Vapi ,Gujarat -396191

.....Respondent

WITH

- **Excise Appeal No. 679 of 2011(Shreeji Aluminium P Ltd)**
- **Excise Appeal No. 680 of 2011(Paresh Babubhai Patel)**
- **Excise Appeal No. 681 of 2011(B S Roadways)**
- **Excise Appeal No. 682 of 2011(Saleem Saheb Patel)**

APPEARANCE

Shri Paritosh Gupta & Shri Saurabh Rachchh, Advocates appeared for the Appellant

Shri Ghanshyam Soni, Joint Commissioner (Authorized Representative) for the Respondent

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

Final Order No. A/10700-10704/2022

DATE OF HEARING: 22.02.2022

DATE OF DECISION:16.06.2022

RAMESH NAIR

These appeals were filed by Steel & Metal Co., Shreeji Aluminium Pvt. Ltd., Paresh Babubhai Patel, B S Roadways and Saleem Saheb Patel against whom, the adjudicating authority imposed penalty under Rule 26 of Central Excise Rules, 2002. Since all these appeals challenge the same Order-in-Original 09/MP/VAPI/2011 dated 29.03.2011, they are taken for disposal by this common order.

2. The brief fact of the case is that an intelligence was collected by the officers of preventive Section of Vapi Commissionerate that M/s G.K. Founders Pvt. Ltd. are indulging in evasions of huge amount of Central Excise Duty by fraudulent avilment of Cenvat Credit on the strength of Central Excise Invoices issued by M/s Shreeji Aluminium Pvt. Ltd. without physical receipts of the goods. They had procured fake lorry receipts without actual transportation of goods from one transporter i.e. M/s B.S. Patel Roadways. Therefore, simultaneous preventive checks/ searches

were carried out on premises of M/s G.K. Founders Pvt. Ltd. transporters and other firms. After thorough investigation, a show cause notice dated 30.12.2009 was issued, proposing demand of Cenvat Credit along with penalty from M/s G.K. Founders Pvt. Ltd. and penalty under Rule 26 of Central Excise Rules 2002 on all the Appellants. By the order-in-original dated 29.03.2011, the Adjudicating authority confirmed the Cenvat demand along with interest and also imposed penalty. In addition, he also imposed penalty on Appellants under Rule 26 of Central Excise Rules, 2002. Aggrieved by the said order, appellants filed present appeals before this Tribunal.

3. Shri Paritosh Gupta and Shri Saurabh Rachchh, Learned Advocates appeared on behalf of Appellant M/s Shreeji Aluminium Pvt. Ltd and Shri Paresh Babubhai Patel submits that basic charges against the Appellants are that they passed on Cenvat Credit on "non-existent" goods shown to have been cleared to M/s G.K. Founders Pvt. Ltd. where the charges are as regards non-existent goods, there is no question of any person dealing with the same, knowing that they are liable for confiscation, since the goods were not handled by the Appellant at all, which were shown to be cleared to the M/s G.K. Founders, as per the charges levelled in subject show cause notice itself. Accordingly, the Appellants cannot be held liable to any penalty under Rule 26 of the Central Excise Rules, 2002. He placed reliance on following decisions.

- Ekta Enterprises & Ors. 2005 (180) ELT 219 (Tri. Mumbai)
- CCE, Pune-I Vs. Keetex 2008 (227) ELT 536 (Tri. Mumbai)
- Ballary Steel & Alloys Ltd. Vs. CCE, Belgaum - 2003 (157) ELT 324 (Tri. Bang.)

3.1 He also submits that the receipts of the goods are questioned at the end of M/s G.K. Founders Pvt. Ltd. The Director of M/s Shreeji Aluminium Pvt. Ltd. in his statement dated 30.11.2006 clearly stated that the goods covered under the invoices mentioned in subject show cause notice were duty paid and cleared to one Shri Mahesh Ranka, however invoices were prepared and issued in favour of M/s G.K. Founders Pvt. Ltd. and the vehicle numbers were mentioned as per the instructions of Shri Mahesh Ranka. Appellant have acted in a bona-fide manner in as much as they have cleared duty paid goods, which is not disputed in the Subject show cause notice or in impugned order.

3.2 He further submits that penalty under Rule 26 is not imposable on a company. No goods were seized in this matter. Fraudulent Cenvat Credit taken by a third person therefore cannot attract penal action against the supplier of duty paid goods. It has been consistently held by the Tribunal in number of cases that in the absence of any confiscation being proposed, no penalty under Rule 26 can be sustained.

3.3 He also submits that impugned show cause notice and order do not bring on records anything to suggest that Shri Paresh Patel was aware of alleged irregular availment of Cenvat Credit by M/s G.K. Founders Pvt. Ltd. Further Shri Paresh did not personally handle the duty paid goods cleared from factory.

3.4 None appeared on behalf of M/s. Steel & Metals, in the grounds of appeal it is submitted that the absence of proposal for confiscation of goods penalty under Rule 26 of Central Excise Rules, 2002 is not imposable. The issue involved in the present case is dispute regarding availment of Cenvat Credit in relation to goods which were not dealt with by the appellant for which Rule under reference does not provide guidelines about the quantum of penalty, therefore imposition of penalty under Rule would not be possible. They are firm and therefore also penalty is not imposable on Appellant under Rule 26.

3.5 At the time of hearing of the appeal, none appeared for the appellants M/s B.S. Roadways and Shri Saleem Saheb Patel. In the grounds of appeals, it is mainly submitted that no goods are available for confiscation and have not even been proposed for confiscation. Under the circumstances, no penalty under Rule 26 can be imposed. Shri Saleem Patel is the owner of M/s B.S. Roadways and separate penalty on the proprietary concern as also the owner cannot otherwise be imposed.

4. Shri Ghanshyam Soni, Joint Commissioner (AR) appearing on behalf of Revenue reiterates the findings of the impugned order.

5. Heard both the sides and perused the records, I find that as far as Appellants M/s Shreeji Aluminium Pvt. Ltd and Shri Paresh Babubhai are concerned, the main contention of the appellants were that no goods were handled by the Appellants. However, I find that Rule 26 of the

Central Excise Rules are applicable to any person who acquires possession of or in any way concerned in transporting, removing, depositing, keeping, concealing, selling or purchasing or in any other manner deals with any excisable goods which he knows or has reason to believe are liable to confiscation. I noticed that in the present matter Shreeji Aluminium have shown the sale of goods to M/s G.K. Founders Pvt. Ltd. without actual delivery of the goods, the transporter in his statement also admitted the said facts. Further, during the course of investigation Shri Paresh Babubhai Patel, Director of M/s Shreeji Aluminium Pvt. Ltd. admitted the facts that invoices were prepared and issued in favour of M/s G.K. Founders Pvt. Ltd. without actual delivery of goods to M/s. G.K. Founders Pvt. Ltd. He also agreed with the statement of transporters. Clearly, Appellants were actively involved in facilitating to pass on the wrong cenvat credit under Cenvat credit Rules by issuing Cenvat Invoices without actual delivery of goods. The person who proposed to sell the goods cannot say that he was not a person concerned with selling of goods and merely issued the invoices. Another submission of the learned counsel was that the show cause notice or the impugned order does not propose confiscation of the goods or held liable to confiscation of such goods, I am unable to appreciate this position. Appellants were concerned with such cenvatable invoices wherein they shown the clearance of goods without delivery and were in the knowledge that such goods are liable to confiscation. I am of the view that under the facts and circumstances, the penalty imposed on them is correct. I also note that the Hon'ble High Court of Gujarat in the case of *Sanjay Vimalbhai Deora v. CESTAT* reported in 2014 (306) E.L.T. 533 (Guj.), has held that a person would render himself liable for penalty for indulging in activities mentioned in Rule 26 of the Central Excise Rules, 2002, even if goods are not confiscated or had not been rendered liable for confiscation. I also note that all the appellants have full knowledge about every stage of removing, keeping, selling, concealing the excisable goods and the same would not have been possible without their active participation and connivance with each other. I also note that the said judgment of the Hon'ble Gujarat High Court has been upheld by the Hon'ble Supreme Court as reported in 2014 (309) E.L.T. A131 (S.C.). Further, the Hon'ble Punjab & Haryana High Court in the case of *Vee Kay Enterprises v. CCE* reported in 2011 (266) E.L.T. 436 (P&H), has held as under :-

"9. As regards applicability of provisions introduced on 1-3-2007 to alleged acts committed prior to the said date, the matter is covered by orders of this Court referred to above which are not shown to be distinguishable. Accordingly, we hold that the amended provisions will not apply to the acts committed prior thereto.

10. In spite of non-applicability of Rule 26(2), penalty could be levied as the appellant was concerned in selling or dealing with the goods which were liable to confiscation inasmuch as the appellant claimed to have sold the goods in respect of which the Cenvat credit was taken. In such a case, Rule 25(1)(d) and 26(1) are also applicable. The person who purports to sell goods cannot say that he was not a person concerned with the selling of goods and merely issued invoice or that he did not contravene a provision relating to evasion of duty. The appellant issued invoices without delivery of goods with intent to enable evasion of duty to which effect a finding has been recorded and which finding has not been challenged. We are, thus, unable to hold that appellant was not liable to pay any penalty."

5.1 Further the contention of the appellant that penalty under Rule 26 cannot be invoked on company is also not tenable. I find that the the Hon'ble Supreme Court in the case of *Madhumilan Syntex Ltd. v. Union of India* reported in 2007 (210) E.L.T. 484 (S.C.) held that the company is not a natural person but legal' or 'juristic' person, cannot be ordered to suffer imprisonment, other consequences but would ensue e.g., payment of fine, etc. The relevant portion of the said decision is reproduced below :-

"23. It is no doubt true that company is not a natural person but 'legal' or 'juristic' person. That, however, does not mean that company is not liable to prosecution under the Act. 'Corporate criminal liability' is not unknown to law. The law is well settled on the point and it is not necessary to discuss it in detail. We may only refer to a recent decision of the Constitution Bench of this Court in *Standard Chartered Bank & Ors. v. Directorate of Enforcement & Ors.*, (2005) 4 SCC 530 = JT (2005) 5 SC 267. In *Standard Chartered Bank*, it was contended on behalf of the company that when a statute fixes criminal liability on corporate bodies and also provides for imposition of substantive sentence, it could not apply to persons other than natural persons and Companies and Corporations cannot be covered by the Act. The majority, however, repelled the contention holding that juristic person is also subject

to criminal liability under the relevant law. Only thing is that in case of substantive sentence, the order is not enforceable and juristic person cannot be ordered to suffer imprisonment. Other consequences, however, would ensue, e.g. payment of fine, etc.”

In view of the above decision of the Hon'ble Supreme Court in the case of Madhumilan Syntex (supra), in my considered view the “person” as mentioned in Rule 26 would cover the “company” for the purpose of imposition of penalty. Hence, the submission of the learned Counsel on this issue cannot be accepted. Under the circumstances, the penalty imposed on the appellants is correct.

5.2 As far as Appellant M/s Steel & Metal is concerned, I find that the said trading firm have played a crucial role in the commission of the offence by M/s G.K. Founders. Appellant were concerned with such cenvatable invoices wherein they shown the clearance of goods without delivery and were in the knowledge that such goods are liable to confiscation. Revenue has been able to prove that the appellants were engaged in the activity of issuance of invoices without movement of the goods. Further, a plain reading of Rule 26 indicates that imposition of the penalty therein is not tied to a condition that excisable goods have to be placed under confiscation under the Act/Rules. On the other hand, what the rule propounds is that a person who is involved either directly or indirectly, by way of possession, or transporting, removing, depositing etc. or in any other manner dealing with excisable goods and who has the knowledge that consequence of such said acts or omissions on his part could result in the impugned goods becoming liable for confiscation under the Act/Rules is then exposed to imposition of penalty under this rule. Only, the person implicated/concerned should have the knowledge of “possible confiscation” of the impugned goods. From the facts on record, the appellant have played crucial role in commission of offence by M/s G.K. Founder. I hold that Appellant is liable to penalty under Rule 26 of the Central Excise Rules.

5.3 As far as Appellant M/s B.S. Roadways and Shri Saleem Saheb Patel are concerned, he was the transporter and made fictitious LRs without actual delivery of goods. Under the facts and circumstances of the case I do not find any reason to set aside such a reasoned orders for the imposition of penalty. However, imposing penalty on M/s. B.S Roadways as well as a separate penalty on Proprietor Shri Saleem Saheb

Patel, I agree with the submission and hold that the proprietary concern is not a different legal entity from the proprietor. I accordingly set aside the separate penalty imposed on Shri Saleem Saheb Patel proprietor of M/s B.S. Roadways.

9. Accordingly, the appeals filed by M/s Shreeji Aluminium Pvt. Ltd, Shri Paresh Babubhai, M/s Steel and Metal and M/s B.S. Roadways are dismissed and appeal of Shri Saleem Saheb Patel is allowed.

(Pronounced in the open court on 16.06.2022)

RAMESH NAIR
MEMBER (JUDICIAL)

Geeta