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

REGIONAL BENCH-COURT NO.3

EXCISE APPEAL NO. 12296 of 2019-SM

(Arising out of OIO-DMN-EXCUS-000-COM-005-19-20 dated 31/05/2019 passed by Commissioner of Central Excise, Customs and Service Tax-DAMAN)

Taher & Company **........Appellant**
G.no.10, Samudra Mahal, 250,
Maulana Azad Road, Nr. Samudra Hotel, Madanpura
MUMBAI, MAHARASHTRA

VERSUS

Commissioner of C.E. & S.T.-Daman **........Respondent**
3RD FLOOR...ADARSH DHAM BUILDING, VAPI-DAMAN ROAD, VAPI
OPP.VAPI TOWN POLICE STATION,
VAPI, GUJARAT-396191

WITH

EXCISE APPEAL NO. 12297 of 2019-SM

(Arising out of OIO-DMN-EXCUS-000-COM-005-19-20 dated 31/05/2019 passed by Commissioner of Central Excise, Customs and Service Tax-DAMAN)

Satish Traders **........Appellant**
72-74, Sutar Chawl, Near Zaveri Bazar, Abdul Rehman Street
MUMBAI, MAHARASHTRA

VERSUS

Commissioner of C.E. & S.T.-Daman **........Respondent**
3RD FLOOR...ADARSH DHAM BUILDING, VAPI-DAMAN ROAD, VAPI
OPP.VAPI TOWN POLICE STATION,
VAPI, GUJARAT-396191

APPEARANCE:
Shri Rahul Gajera, Advocate appeared for the Appellant
Smt. Sunita Menon, Superintendent(AR) appeared for the Respondent

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

Final Order No.13180-13181/2024

DATE OF HEARING: 12.12.2024
DATE OF DECISION: 12.12.2024

RAMESH NAIR

The following principal Issues arise for consideration in this Appeal:

1.1 Whether imposition of penalty under Rule 209A of the Central Excise Rules 1944 on the Appellants, is sustainable in law, on the ground that in respect of DTA sales made by 100% EOU (Unimin India Ltd) to the Appellants, the Appellants allegedly paid cash amounts over and above the price mentioned in Excise Invoices of the 100% EOU, 1.2 Whether it is established by evidence that the Appellants had paid cash amounts over and above the price mentioned in the Excise Invoices of the 100% EOU, towards the price of the goods purchased by the Appellants from the 100% EOU,

1.3 Whether in any event, the price charged by the 100% EOU for goods cleared in DTA, is entirely irrelevant to the question of valuation of goods cleared in DTA, since under the Proviso to Section 3(1) of the Central Excise Act 1944, the duty on such goods is payable on the value determined in accordance with the provisions of Customs Act 1962 i.e. by reference to import price of like goods,

1.4 Whether in any event, goods cleared by 100% EOU are governed by Chapter VA of the Central Excise Rules 2002 which is complete self-contained code for 100% EOU, to which provisions of Confiscation under Rule 173Q invoked in Show Cause Notice do not apply and consequently penalty under Rule 209A cannot be imposed,

1.5 Whether in any event, penalty under Rule 209A cannot be imposed on a partnership firm,

1.6 Whether in any event, the impugned Order-in-original in relation to the Appellant is a non-speaking order since it does not give any finding on most of the Appellants' submissions reproduced in Paras 8.8.1 to 8.8.6 of the Order and is therefore liable to be set aside on this ground itself.

2. Shri Rahul Gajera, Learned Counsel appearing on behalf of the appellant submits that it is not established by evidence that the appellant had paid cash amount over and above the price indicated in the excise invoice issued by 100% EOU Unimin India Limited towards the price of the goods purchased by the appellant from the said 100% EOU. Therefore, the entire case against the appellant fails. He placed reliance on the following judgments:-

a) Bajrangbali Ingots & Steel P. Ltd v CCE – 2019 (1) TMI 966-CESTAT-NEW DELHI,
b) Raipur Forging P. Ltd v CCE – 2016 (335) ELT 297
c) CCE v Garg Industries P. Ltd – 2023 (385) ELT 541
d) Continental Cement Co v UOI – 2014 (309) ELT 411 (All).

2.1 He further submits that the statement of various persons relied upon in the show cause notice are not admissible in evidence unless the requirements of Section 9D of the Central Excise Act,1944 are satisfied by examination of the deponents of the statements before the adjudicating authority. Reliance is placed in this behalf on the following judgments:-

a) J & K Cigarettes Ltd v CCE – 2009 (242) ELT 18
b) Basudev Garg v CC – 2013 (294) ELT 353.

2.2 He further submits in any event, the price charged by the 100% EOU for goods cleared in DTA, is entirely irrelevant to the question of valuation of goods cleared in DTA, since under the Proviso to Section 3(1) of the Central Excise Act 1944, the duty on such goods is payable on the value determined in accordance with the provisions of Customs Act 1962 i.e. by reference to import price of like goods. In this regard he placed reliance on the Hon'ble Supreme Court judgment in the case of CCE v Morarjee Brembana Ltd – 2015 (318) ELT 600 (SC). He also submits that in any event, goods cleared by 100% EOU are governed by Chapter VA of the Central Excise Rules, 2002 which is complete self-contained code for 100% EOU, to which provisions of Confiscation under Rule 173Q do not apply and consequently penalty under Rule 209A cannot be imposed. He placed reliance on the following judgments:

a) Alsa Marine & Harvests Ltd v CC – 2003 (158) ELT 741
b) Sandur Laminates Ltd v CCE – 2001 (133) ELT 107
c) Bee International v CCE – 2007 (220) ELT 128.

2.3 Alternatively, he submits that in any event, no penalty under Rule 209A of the Central Excise Rules 1944 can be imposed on a partnership firm. In this regard the he placed reliance on the following judgments:-

a) Woodmen Industries v Commissioner- 2004 (164) ELT 339

b) Commissioner v Woodmen Industries – 2004 (170) ELT A307

c) R.S.Jhaveri & Co Exports v CCE – 2010 (252) ELT 375.

3. Smt. Sunita Menon, Learned Superintendent(AR) appearing on behalf of the revenue, reiterates the findings of the impugned order.

4. I have carefully considered the submissions made by the both the sides and perused the records. I find that the Learned Counsel, made various alternative submissions, however, I am of the view that the appeal can be decided only on the one issue i.e. whether penalty under Rule 209A can be imposed on partnership firm. In this regard, following judgments support the case of the appellant.

- Commissioner v Woodmen Industries – 2004 (170) ELT A307

> *"The Appellate Tribunal in its impugned order had held that Central Excise Law does not permits Commissioner of Central Excise to assume power under Income-tax Act.*
> *The Tribunal further relying on an earlier order in the case of Aditya Steel Industries [1996 (84) E.L.T. 229 (Tribunal)] held that penalty under Rule 26 of Central Excise Rules, 2002 was imposable only on a person and not on a firm.*
> *The Tribunal also held allegation of receipt of additional consideration from buyer is not sustainable on the basis of scribblings in personal note-book from Chartered Accountant when there is no corroborating evidence regarding same."*

- R.S.Jhaveri & Co Exports v CCE – 2010 (252) ELT 375.

> *"4. After hearing both sides and after going through the written submission, we find that the Commissioner has imposed penalties on the purchasers of the goods by observing as under :*
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> > *"8. Next comes the question as to whether the Noticee No. 2 to 7 are liable to personal penalty under Rule 209A of CER, 1944/Rule 26 of CER, 2001/2002. I find that these notices had acquired cotton yarn without payment of duty from Noticee No. 1 against CT-2/Annexure I certificate issued by the jurisdictional Range Officers. It has been pleaded that since the CT-2/Annexure I certificate mentioned the name of the unit - M/s. I.C. Textiles as the unit from which the cotton yarn was to be purchased without payment of C.E. duty, the department knew that the goods are being acquired from a 100% EOU and therefore their bona fide intentions cannot be suspected. However, I find that in none of the CT-2/Annexure I certificate, the fact that M/s. I.C. Textiles is a 100% EOU is mentioned. The Noticee No. 2 to 7 sought CT-2/Annexure I certificates for purchase of cotton yarn free from C.E. duty under Rule*

13(I)(b) of the CER, 1944/Rule 19(2) of CER, 2001/2002 from M/s. I.C. Textiles situated at National Highway No. 8, Village Lakodara, Karjan, Dist: Vadodara without mentioning the fact that it is a 100% EOU and such CT-2/Annexure I certificates were issued by the jurisdictional Range Officer. Even the C.E. duty involved on the quantity of the cotton yam sought to be purchased from the Noticee No. 1 as mentioned in CT-2/Annexure I certificate, had been computed by treating M/s. I.C. Textiles as a DTA unit, not by treating it a 100% EOU. Noticee Nos. 2 to 7, being fully aware of the provisions of the EXIM Policy as well as Central Excise Rules, should have known that they were not be entitled to purchase the goods free of C.E. duty from a 100% EOU under Rule 13(I)(b) of CER, 1944/Rule 19(2) of CER, 2001/2002 for use in the manufacture of goods for export, but still they purchased cotton yarn without payment of duty from Noticee No. 1. I also find that after acquiring the cotton yarn free of C.E. duty, the fabrics made out of the same have been exported under DEPB scheme and thus they have enjoyed double benefit and they have done so by obtaining the CT-2/Annexure I certificate by mis-representing M/s. I.C. Textiles as a DTA unit in their application for the iron of then certificates. I, therefore, hold that the Noticee Nos. 2 to 7 knew the illicit nature of the cotton yarn purchased by them from Noticee No. 1 and therefore they are also liable for personal penalty under Rule 209A of CER, 1944/Rule 19(2) of CER, 2001/2002."

5. As against the above, the appellants have contended as follows :

(i) that the yarn was purchased from I.C. Textiles under Annexure I/CT-2 Certificate, duly complying with the statutory provisions of Central Excise.

(ii) CT-2 Certificate/Annexure I were issued by the Department after verifying the statutory procedures, safeguards laid down in the law.

(iii) There is no evidence of any connivance between the proper officers and the appellant.

(iv) That there is no provisions in the said Annexure I to mention or disclose the information about 100% EOU status of the supplier of the goods.

(v) That the copies of invoices received from the said M/s. I.C. Textiles were being supplied to the Department. Such invoices had very prominent display of the words '100% EOU'. As such it cannot be said that the appellants concealed the fact of M/s. I.C. Textiles being a 100% EOU.

(vi) That there is no evidence on record to show that the appellants had reasons to believe that the goods procured by them were confiscable. On the contrary, the appellants had a reason to believe that the documentation of the impugned goods were free from any encumbrance of Central Excise, mainly on the ground that those were procured under Annexure-I, duly endorsed by competent authority of Central Excise.

(vii) That the Revenue's case is based upon the fact that 100% EOU can make only such clearances in DTA as specified in the aforesaid provisions. It was not possible for the appellant to know whether the clearances made by M/s. I.C. Textiles are other than those "specified under the aforesaid provisions", under which admittedly same could be cleared by M/s. I.C. Textiles in DTA.

(viii) That it is well settled that penalty under Rule 26 cannot be imposed upon any company or partnership firm, as held by the Tribunal in case of M/s. Ponneri Steel Industries - 2008 (221) E.L.T. 290 (Tri.), and in case of M/s. Woodmen Industries - 2004 (164) E.L.T. 339 (Tri.), as confirmed by Hon'ble Supreme Court in 2004 (170) E.L.T. A307 (S.C.).

(ix) That the entire proceedings are Revenue neutral inasmuch as even if they had procured the goods from M/s. I.C. Textiles on payment of duty, they were in a position to avail the Cenvat credit on the goods, which were eligible to be refunded to them in cash, inasmuch as the

goods were used in manufacture and export of final product. As such, there was no intention on their part to evade duty and the entire situation being Revenue neutral, no penalty can be imposed upon them. They have relied upon the precedent decisions in support of the above contention.

5. After having appreciated the statements made by the appellant and after having gone through the impugned order, which stand reiterated by learned SDR, we find that procurement of yarn was made by the appellant on the basis of Annexure I/CT-2 certificate issued by the Revenue itself. As is clear from the relevant paragraph reproduced above, Revenue's only objection is that the fact of the supplier unit being a 100% EOU was never disclosed to them. We find no merits in the above reasonings. Apart from the fact that there is no legal obligation on the part of the purchasers to disclose that the supplier is a 100% EOU, we note that the fact of M/s. I.C. Textiles being 100% EOU was clearly available from the invoices issued by them. A sample invoice stand produced before us and we note that 100% EOU stand prominently displayed in the middle of the body of invoice issued by M/s. I.C. Textiles. As such, it cannot be said that the said fact was suppressed from the Revenue with any intention to evade duty. We also note that buyers of the yarn on the basis of the legal certificate issued by the Department cannot be expected to know as to whether 100% EOU is entitled to sell the goods in question in DTA or not. We also find force in the appellant's contention that the entire situation is Revenue neutral, inasmuch as the buyers/appellants have used the material in the manufacture of their final product, which stand exported by them and they were entitled to refund of any duty paid on the raw materials. The appellant's contention that no penalty can be imposed upon them, duly supported by precedent decisions, is also required to be accepted.

6. In view of the above, we set aside the penalties imposed upon all other appellants in terms of Rule 26/erstwhile Rule 209A. The appeals are, accordingly, allowed, except the appeal of M/s. I.C. Textiles, which stand dismissed for non-prosecution."

From the above Judgment it is clear that penalty under 209A which is pari materia of Rule 26, penalty cannot be imposed on partnership firm. As regard the penalty on the partner, I find that it is settled by the Hon'ble Gujarat High Court in the case of Jay Prakash Motwani citation that in case of partnership firm penalty on the partner cannot be imposed. Accordingly, penalties on both the appellants are not sustainable only on the above finding. All other issues raised by the appellant are left open.

5. Accordingly, we set aside the penalties and allow the appeals with consequential relief.

(Pronounced in the open court on 12.12.2024)

(RAMESH NAIR)
MEMBER (JUDICIAL)

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