IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH : ALLAHABAD
COURT No. I

APPEAL Nos.E/2885 & 2835/2012-EX[DB]

(Arising out of Order-in-Appeal No. 41 & 42-CE/GZB/2012 dated 29/02/2012 passed by Commissioner of Central Excise & Customs (Appeals), Ghaziabad)

M/s Soham Packaging Pvt. Ltd. &

Shri Upendra Goenka **Appellants**

Vs.

Commissioner of Central Excise & S.T., Ghaziabad **Respondent**

Appearance:

Shri Sharad Chandra Tiwari, Consultant for Appellant
Shri Rajeev Ranjan, Additional Commissioner (AR), for Respondent

CORAM:

Hon'ble Smt. Archana Wadhwa, Member (Judicial)
Hon'ble Mr. Anil G. Shakkarwar, Member (Technical)

Date of Hearing : 19/07/2018
Date of Pronouncement : /08/2018

FINAL ORDER NOs-**71949-71950 / 2018**

Per: Archana Wadhwa

As per facts on record, the appellant is engaged in the manufacture of Corrugated Boxes, Cartons & other articles of Paper & Paper Board etc. falling under Chapter 48 of the first schedule to the Central Excise Tariff Act, 1985 and were availing the benefit of Cenvat credit of the duty paid on the inputs i.e. Semi Kraft Paper, Virgin Kraft & Duplex Paper/Board.

2. There factory was visited by Anti-Evasion of Central Excise officers on 05.10.2007, who conducted various checks and verifications. Certain shortages were found in various raw materials for which a separate show cause notice dated 02.04.2008 stands issued to them, which is not the subject to matter of present appeal.

3. Subsequently, revenue conducted investigations and recorded the statements of various persons. Statement of Shri Upendra Gupta, Director of the manufacturing unit as also Shri Navneet Kumar, Security personal, Shri Kiran Chand, Production Supervisor, Shri Tirath Raj Dubey working as Supervisor, Shri R.K. Singh, Electrician, Shri Sanjay Garg, Account Officer, Shri C.S. Arneja, Sales Officer and Shri Jitender Verma, DEO were recorded. Based on the said statements and investigations conducted by the revenue, a view was entertained that the appellants have wrongly availed the Cenvat credit on Duplex Paper during the period from 01.04.2007 to 04.10.2007, inasmuch as, they have received 6,47,801 kgs of Duplex Paper, whereas they have issued the same for manufacture of Corrugated Boxes only to the extent of 4,75,572 kgs. Accordingly, revenue was of the belief that the excess Duplex Paper entered in their Cenvat records involving duty of Rs.12,31,553/- was availed only on the basis of the invoices issued by the raw material supplier, without the actual receipt of the said Duplex Paper.

4. Further, the scrutiny of the dispatch advice revealed that the appellant used to mention two code words 'A' & 'B' on the said dispatch advices. Whereas invoices were being prepared in respect of dispatch marked with code 'A', no invoices were being issued in respect of 'B' code, in some of the cases. As such a view was entertained that the code no. 'B' marked on the dispatch advice was cleared by the appellants without payment of duty to the extent of around Rs.4 lakhs. Further, clandestine removal of the final product was alleged involving duty to the extent of around Rs.65,534/- based upon the parallel invoices recovered during the course of the search of the factory, for the period from April, 2005 to September, 2007 and evasion of duty to the extent of Rs.2,832/- was alleged on the mis-declaration of the goods in the invoices.

5. In the above back ground, proceedings were initiated against the appellant by way of issuance of show cause notice dated 07.07.2010, proposing confirmation of all the demands and proposing imposition of penalty on the appellant-company as well as on the Director. The said show cause notice culminated into an order passed by the Additional Commissioner confirming the demand and imposing penalties on the appellant-company as well as on the Director. The order of the Original Adjudicating Authority stands upheld by the Commissioner (Appeals) and hence the present appeals.

6. After hearing both the sides, we find that the major demand of Rs.12,31,553/- in respect of the Duplex Paper, which is one of the raw materials of the appellant is on the finding that the Cenvat credit in respect of said Duplex Paper has been availed by appellants without actual physical receipt of the goods in question. The said findings are based on the fact that during the relevant period appellant had received a particle quantity of Duplex Paper, whereas only a part quantity stands issued from their record, for use in the manufacture of final products.

We find no merits in the above contention of revenue. The issuance of raw material from the Cenvat account is not on one to one co-relation basis. Revenue has picked up a particular period and has relied upon the receipt during that period and the consumption shown in that period. Raw material received in one particular period can always be used in the subsequent periods. The credit is available to the assessee at the time of receipt of the said raw material and there is no requirement of its use, for earning the credit. Further, the revenue has relied upon the statements of various persons recorded during investigation. Even though we find that the said statements are strictly not confessional statements but the fact remains that the statements by themselves cannot be held to be sufficient evidence to uphold the allegations without putting the deponents of the said statements to examination-in-chief or to cross examination. And as such, the said statements are to be kept out of consideration, as held by Hon'ble Punjab & Haryana High Court in the case of M/s Jindal Drugs Pvt. Ltd. Vs Union of India 2016 (340) ELT 67 (P & H) and nothing survives in the present case of the revenue.

We also note that the appellants have taken a categorical stand before the authorities below, which does not stand disputed by the revenue that the payments were by the appellants through the bank channels i.e. ride cheques, which establishes that the Duplex Paper Board was actually purchased by the appellants. There is neither any allegation nor any evidence of flow back of money from the raw material seller to the appellants. The consideration of the raw material having been made by way of cheques and there being no evidence to support the revenue's allegations, we are of the view that the denial of credit to the appellants on the said sole ground is not sustainable.

We also note that the appellants having availed the credit in respect of the Duplex paper, is duty bound to show the utilization of the raw material in the manufacture of their final product. It is not understood as to how in the absence of the Duplex paper, the assessee would manufacture their final product. Further, we also note that the revenue has not made any effort to establish as to how much raw material of Duplex

Board is required in the manufacture of one unit of final product and has not made any reference to the other raw materials, which are also required for the manufacture of Final product. As such, we find no justifiable reason to uphold the denial of the credit to appellants, which has been availed by them by reflecting the same in their Cenvat records which were also being produced by them before their jurisdictional Central Excise Officers, without any objection.

7. At this stage, we may take note of some of the Tribunal's decision dealing with on identical issue Tribunal in the case of Manoranjan Singh Duggal Vs Commissioner of Central Excise, Faridabad Delhi 2015 (325) ELT 892 (Tri.-Del.) has held that credit cannot be denied on the ground that the same was availed only on the basis of the invoices without supply of the goods in the absence of any finding of documents evidence when the payments stand made through banking channels and no investigation stands conducted with the raw material supplier. In the present case also we note that the revenue has not approached the raw material supplier and has not investigated the material at their end to the same effect is the Tribunal's decision in the case of Commissioner of Central Excise Delhi Vs Bharat Interprises 2017 (346) ELT 308.

8. In view of the forgoing we set aside the demand of duty of Rs.12,31,553/- along with penalty of identical amount.

9. As regards the confirmation of demand of Rs.4,06,382/- based upon the dispatch advices and parallel invoices, there is a recording by the Commissioner (Appeals) that the appellants have not contested the above demand and as such the same is being upheld. Learned Advocate appearing for appellant submits that the said demand stands contested by them and the above observations made by Commissioner (Appeals) are factually in correct. Inasmuch as, there is a dispute on the said factual fact, we deem it fit to set aside the said part of the order and remand the matter to the Commissioner (Appeals) for fresh decision, after affording an opportunity to the appellant.

10. As regards the penalty to Rs.3 lakhs imposed on Shri Upendra Goenka, Director, we note that the same stands imposed in terms of Rule 26 of Central Excise Rules without there being any order of confiscation of goods. The Tribunal in the case of M/s Yamuna Machines Works Pvt. Ltd. Vs Commissioner of Central Excise, Vapi reported at 2013 (298) ELT 86 (Tri.-Ahmd.), by following the precedent decision of the Tribunal in the case of M/s Air Carrying Pvt. Ltd. Vs Commissioner reported at 2008 (229) ELT 80 (Tribunal), has set aside the penalty and has held that in the absence of any proposal for confiscation, penalty under Rule, 26 cannot be imposed. Otherwise also we note that there is no evidence on record indicating any malafide on the part of Director,

showing his association with any illegal activity. In any case, we have set aside the major part of the demand and have remanded the balance portion, we find no justifiable reason to impose penalty on the said appellant. Accordingly, penalty of Rs.3 lakhs imposed on Shri Upendra Goenka is set aside and the appeal is allowed to that extent.

11. Both the appeals are disposed of in above manner.

(Pronounced in Court on- /08/2018)

(Anil G. Shakkarwar)
Member (Technical)

(Archana Wadhwa)
Member (Judicial)

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