CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
SCO 147-148, SECTOR 17-C, CHANDIGARH – 160 017

SINGLE MEMBER BENCH
COURT NO. II

APPEAL NOs. E/505-506/2010-EX[SM]

[Arising out of Order-in-Appeal No. 254-266/CE/DLH/2009 dated 30.11.2009 passed by the Commissioner of Central Excise (Appeals), Delhi-II]

Date of hearing/decision: 19.03.2018

For approval and signature:

Hon'ble Mr. Devender Singh, Member (Technical)

CCE, Panchkula : **Appellant(s)**

VS

1. **Krishna Machine Tools** : **Respondent(s)**
2. **Kumar Abhishek Engineering Co.**

Appearance:
Present for the Appellant(s): Mr. Tarun Kumar, A.R.
Present for the Respondent(s): None

CORAM:

Hon'ble Mr. Devender Singh, Member (Technical)

FINAL ORDER NO. 61992-61993/2018

Per : Devender Singh

These two appeals have been filed by the Revenue against the impugned order dt. 30.11.2009 passed by the Commissioner (Appeals).

2. Sh. Naveen Bindal, Advocate, whose name appears in the cause list for respondent no.2 and who was present in the Court, at the outset, clarified that though his name is appearing in the cause list,

he is no longer representing the respondent no.2 M/s Kumar Abhishek Engineering Company.

3. On the matter being called, there is none for the respondents. It is seen that in the last three dates of hearing also, no appearance was caused on behalf of the respondents despite notice. In this background, as the matter pertains to 2010, the same is taken up for disposal with the help of Ld. A.R.

4. Brief facts of the case are that an investigation was carried out by Central Excise Intelligence in the case of M/s Ind-Swift Limited, Panchkula, involving fraudulent availment of inadmissible Cenvat credit on the basis of invoices received from a large number of firms located in Ghaziabad and Noida without actual receipt of material. A show cause notice was issued to M/s Ind-Swift Limited and to other co-noticees, who had issued the invoices without supplying any goods. The two respondents in the present appeals were also alleged to be involved in issuance of such bogus invoices. The matter was adjudicated and the demand of Rs. 46,35,680/- against M/s Ind-Swift Limited was confirmed and penalties of Rs. 21,12,000/- and Rs. 14,40,000/- were imposed on the two respondents in these appeals. From the facts recorded in the order of the Commissioner (Appeals), it emerges that M/s Ind-Swift along with four co-noticees approached the Settlement Commission for settlement their cases. The Settlement Commission vide Final Order No. 549-550/CE/07-SC(PB) dt. 23.05.2007 appropriated the full demand of duty deposited with no further duty liability and granted complete immunity from penalty and prosecution to M/s Ind-Swift and other four co-noticees, who had

moved their case before Settlement Commission. The amount of duty and interest was also ordered to be recovered from the sum of Rs. one crore already lying deposited by M/s Ind-Swift Ltd. The two respondents in these appeals did not approach the Settlement Commission. Their cases were adjudicated and penalties were imposed on them by adjudicating authority. In appeals filed by them, the Commissioner (Appeals) has set aside the penalties on the ground that since immunity of penalty has been granted to the main accused by the assessee in the instant case, penalties under Rule 25 of Central Excise Rules to the present respondents, who have preferred appeal, is also not warranted. The Commissioner (Appeals) relied on the order passed by the CESTAT, Mumbai in the case of *Shri S.K. Colombowala & others vs. Commissioner of Customs (Import) Mumbai – 2007 (220) ELT 492 (Tri.-Mumbai).* Aggrieved from the same, the Revenue has filed these appeals.

5. Ld. A.R. relies upon the recent judgment of this Tribunal in the case of *Mamta Garg vs. Commissioner of C.Ex., Noida – 2018 (359) ELT 77 (Tri.-Del.)* to argue that immunity given by the Settlement Commission to main party cannot be extended automatically to other co-noticees, who have not approched the Settlement Commission. He further argues that the said judgment has considered the Larger Bench's decision in the case of *Shri S.K. Colombowala (supra)*. He also reiterated the findings in the order of adjudicating authority and underlined that the present two respondents have not taken the Central Excise registration and were issuing invoices without supplying the goods.

6. Heard the Ld. A.R. and considered the submissions and perused the records.

7. I find that the show cause notice was issued to M/s Ind-Swift Limited and other co-noticees for fraudulent availment of inadmissible Cenvat credit. The main party M/s Ind-Swift Limited approached in the Settlement Commission and some other co-noticees also approached the Settlement Commission and their cases were settled and immunity from penalty was granted. The present two respondents did not approach the Settlement Commission. Their cases were adjudicated by adjudicating authority, who confirmed the penalties on both of them under Rule 25 of Central Excise Rules, 2002. In appeal, the Commissioner (Appeals) has set aside the penalties on both of the present respondents on the ground that the offence committed by them does not warrant penalties under Rule 25 and the main accused in the instant case has been granted immunity from penalties and prosecution. The last finding is based on the Tribunal's judgment in the case of *Shri S.K. Colombowala (supra)*.

8. As rightly pointed out by Ld. A.R., I find that the issue pertaining to waiver of penalty on the co-noticees, who do not approach the Settlement Commission and undergo the adjudication process has been decided by the judgment of this Tribunal in the difference of opinion case of *Mamta Garg (supra),* wherein the Tribunal has held as below:

> ***"36.*** *The Hon'ble Bombay High Court in Yogesh Korani – 2003 (159) ELT 3 (Bombay), as affirmed by the Hon'ble Supreme Court reported in 2004 (163) ELT A50 (S.C.), held that when the penalty was levied on the petitioner based on*

the independent and distinct causes of action then they cannot be considered on par with the main noticee. The reliance placed by the Ld. Counsel on S.K. Colombowala (supra) and various other decisions, which followed the same, can be distinguished by examining the allegations in notice and role of each person, who was served with the notice. If the cause of action and the offence involved in distinct and can be treated for penal action independently, then no immunity will be extended automatically to such co-noticee even if the main assessee gets the matter settled before the Settlement Commission.

37. *Ld. Counsel also submits, briefly, regarding non-liability of the appellant for penalty on merits as already noted earlier in this order. Only the legal issue regarding immunity available to the co-noticee (here, "the four appellants") has been examined in the present reference as there is no decision on merit recorded by the Division Bench.*

38. *In view of the above discussions and analysis, I hold that the appeals filed by the appellants cannot be allowed automatically on the ground that the main noticee got immunity from the Settlement Commission. The reference is answered accordingly."*

The above judgment has considered the judgment of this Tribunal in the case of *Shri S.K. Colombowala (supra)*.

9. It has been held by this Tribunal in the case of *Larsen & Toubro Ltd. vs. CST, Delhi – 2013 (32) STR 410 (Tri.-Delhi)* that wherever pursuant to a conflict opinion in a decision by a Division Bench, the conflict is referred to a Third Member of this Tribunal for resolution, the resultant judgment must be considered the judgment of a Full Bench, as if it were a judgment of a Larger Bench (three Ld. Members) sitting *en banc*.

10. In view of the above and by following the judgment in the case of *Mamta Garg (supra)*, I hold that the appeals filed by present respondents can not be allowed on the ground that main accused got

immunity from the Settlement Commission. The Commissioner (Appeals) is therefore required to examine the merits of the present case with the merits of the case against the main accused. Besides, I also find that the findings on merit given by Ld. Commissioner (Appeals) are very terse and restricted to simply endorsing the order of the adjudicating authority without giving any kind of analysis on the basis of which he came to the conclusion that these cases are not of the type where penalties under Rule 25 are not imposable. Commissioner (Appeals) should also record proper findings on the merits of the case *per se*. Commissioner (Appeals) is therefore required to examine the case afresh in view of the ruling of this Tribunal in the case of *Mamta Garg (supra)* and give clear findings on whether cause of action and offence involved is distinct in the main case and the case of the present assesses. On merits also, the Commissioner (Appeals) should give reasoned analysis and findings. The impugned order is therefore set aside and the matter is remanded back to the Commissioner (Appeals) for de novo adjudication keeping the above directions in view. Proper opportunity should be given to the respondents to defend their case.

11. In view of the foregoing, the appeal is disposed of by way of remand in above terms.

(Dictated and pronounced in the court)

(Devender Singh)
Member (Technical)

RAS'