CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH COURT NO.IV

EXCISE APPEAL NO. 52720/2019

[Arising out of Order-in-Original No. 05/COMMR/CEX-IND/2019 dated 25.04.2019 passed by the Commissioner CGST & Central Excise, Indore]

M/s. JAIN ISPAT **APPELLANT**
304, Anmol Sagar Darshan
9/1, New Palasia, Indore.

Vs.

COMMISSIONER OF CGST AND CENTRAL EXCISE, INDORE **RESPONDENT**

WITH

EXCISE APPEAL NO. 50167/2020

[Arising out of Order-in-Original No. 05/COMMR/CEX-IND/2019 dated 25.04.2019 passed by the Commissioner CGST & Central Excise, Indore]

M/s. K G ISPAT PVT LTD **APPELLANT**
101-102, Paresh Tower
822, New Loha Mandi, Indore

Vs.

COMMISSIONER OF CGST AND CENTRAL EXCISE, INDORE **RESPONDENT**

APPEARANCE:

Ms Priyanka Goel, Advocate for the Appellant
Ms Tamanna Alam, Authorised Representative for the Department

CORAM:

HON'BLE MRS RACHNA GUPTA, MEMBER (JUDICIAL)

DATE OF HEARING: January 17, 2022
DATE OF DECISION: 22.03.2022

FINAL ORDER No. 50267-50268 /2022

PER RACHNA GUPTA

The present order disposes of two appeals arising out of the same Order-in-Original No. 05/2019 dated 25.04.2019 . The facts in brief are as follows:

M/s. Allianz Steel Ltd. (ASL in short) were engaged in manufacture of MS Ingots. They used to procure their raw material i.e. iron and steel scrap, sponge iron, ferro alloys, MS Ingots (HC) from the raw material providers and were availing the CENVAT Credit facility under the CENVAT Credit Rules, 2004. On 02.05.2008, the officers of the Directorate General of Central Excise Intelligence, Regional Unit, Indore (hereinafter referred to as DGCEI) searched the business premises of M/s. Jain Ispat. Certain documents including the photocopies of Lorry receipts of M/s. New Annapurna Roadlines, Pithampur showing the transportation of different iron and steel scrap under cennvatable invoices issued to M/s. ASL. Scrutiny of these documents and further investigations indicated that these were invoices based whereupon M/s ASL were wrongly availing the CENVAT credit on the strength of aforesaid invoices issued by M/s. Jain Ispat without actually receiving the inputs of these invoices in their factory.

The search got conducted in the premises of M/s. ASL on 29.9.2008 observing the shortage of 177.855 MT of MS ingots in their factory than the recorded balance shown in their RG I record. Also the physical shortage of 393.995 MT of inputs than the stock shown in their form IV record was found. It is thereafter that the Show Cause Notice No. 3210 dated 06.09.2010 was issued with the allegations that M/s. ASL during the period 25.6.2008 to 24.09.2008 have clandestinely cleared 1463.11 MT of MS ingots from their factory without issue of Central Excise invoices and without payment of Central Excise duty leviable thereupon. It was alleged that M/s. ASL have availed the CENVAT Credit on their inputs for which the invoices were issued by both the appellants herein i.e. M/s. K. G. Ispat and M/s. Jain Ispat, the registered dealers. Accordingly vide the Show Cause Notice Central Excise duty amounting to Rs. 69,13,299/- along with the CENVAT Credit amounting to Rs. 76,20,922/- was proposed to be recovered from M/s. ASL along with the penalty and interest. The penalty was also proposed to be imposed upon M/s. K G Ispat against the appellant also. The said proposal was confirmed vide the impugned order under challenge. Penalty of Rs.10 lakh each has been imposed upon both the appellants herein. Being aggrieved the appellants are before this Tribunal.

2. It is submitted on behalf of M/s. Jain Ispat that penalty upon them has been imposed under Rule 26 of Central Excise Rules, 2002. However no sub rule has been mentioned in the Show cause Notice. Otherwise also the penalty for issuing false / fake notices can only be imposed after invocation of sub rule (2) of Rule 26 of Central Excise Rules 2002 with effect from 1.3.2007. But the said sub rule has not been invoked in the Show Cause Notice. The invoices in question are otherwise for the period prior to said introduction of said rule. The imposition of penalty is liable to be set aside on the sole ground. Learned Counsel has laid emphasis on decision of Apex Court in the case of **Amrit Foods vs. CCE, UP** reported as **[2005-TIOL-164-SC-CX]**. It is mentioned that even the Order-in-Original / order under challenge does not specify any sub rule of Rule 26.

3. It is further submitted that at the time of search in the premises of M/s. Jain Ispat on 02.05.2008, 75 invoices were recovered from them but only 18 out of them have been examined and just 11 vehicles owners have been examined. The finding against the appellants are therefore merely presumptive. The lack of evidence against the appellant is also impressed upon. It is further submitted that there is no cash trail found with respect to any of these invoices nor any evidence corroborating the alleged monetary benefit to the appellants. Moreover, there is no order of confiscation of the goods. The entire investigation of the department is alleged to be an eye wash with no cogent evidence against the appellant.

3. With respect to M/s. K G Ispat, it is submitted in addition to above submissions that question of imposition of penalty upon them does not at all arise for the reason that no search was at all conducted in their premises. Though 21 invoices being issued by them were recovered from the premises of M/s. ASL. However, only three of them were examined resulting into no evidence as against M/s. K G Ispat Ld.. it is submitted on their behalf that 3rd party evidence cannot be relied upon for imposing penalty upon M/s. K G Ispat. In view of the above submissions, the order under challenge is prayed to be set aside and appeals are prayed to be allowed.

4. Learned Counsel has laid emphasis upon the decision of Hon'ble Allahabad High Court in the case of **Continental Cement vs. Union of India** reported as **[2014 (309) E.L.T. 411 (All.)]** to prove that invoices were issued without transportation of goods.

5. To rebut these submissions learned Departmental Representative has laid emphasis upon para 19, 20 and 22 of the Order-in-Original / Order under challenge where in the cross

examination of the transporter as was conducted at the direction of Order of this Tribunal dated 21.2.2017 has been appreciated, where outrightly they had denied to have transported the imports/ raw material from M/s. K G Ispat and M/s. Jain Ispat to M/s. ASL. The earlier invoices were showing sale of invoices to M/s. ASL which were recovered from the premises of Jain ispat. These were invoices issued by both the appeals based whereupon M/s. ASL have availing the CENVAT credit on the invoices. The demand thereof has already been confirmed against M/s. ASL. They have not come forward to challenge the said demand. There is otherwise apparent admission in all the replies of M/s. ASL but also of the present appellants on record. Thus there is no infirmity in the order under challenge which has been passed after meticulously examining the evidence on record. The appeals are therefore, prayed to be dismissed.

6. After hearing the rival contentions and perusing the entire record, I observe and hold as follows:

There is no denial to the fact by the appellants that M/s. ASL has not challenged the impugned order vide which the entire demand against them to the tune of Rs. 69,13,299/- and Rs.76,20,922/- along with the proportionate interest and penalty to the equal amount has been confirmed. Statement of Director of M/s. ASL, Shri Vikram Agnihotri is very much on record where he has admitted that on some occasions they were purchasing the iron and steel scrap from the market. Both the appellants have been admitted to be their raw material suppliers. When it came to proving the purchase of raw material respect of imports from the present appellants. Shri Vikram Agnihotri had not deposed as to who arranged the transport and who paid the freight while receiving raw material from the present appellants. The explanation given by him is that the consumption of raw material was handled by different employees at different times of the factory. Hence he was not in a position to explain the observed shortage at the time of factory visit. He rather specifically admitted that shortage may be due to clearance of finished goods from his factory by his employees without his knowledge and also there could be accounting difference of raw material in their record without actually receiving the same physically in their factory. The said explanation have clearly been admitted to be the reason for the instant shortage of finished goods as well as of scrap found in their factory on 29.9.2008 by the officer of DGCEI. Though names of employees were provided but none of them were produced for being examined at the time of investigation. Admission need no further proof unless they are withdrawn or retracted. There is no apparent retraction or withdrawal of Shri Vikram Agnihotri, hence the findings against M/s. ALS are observed to have rightly been arrived at. They have not come forward also to challenge the same. In the given circumstances, the reliance on the case **Continental Cement** (supra) is not at all sustainable.

7. Coming to the case of M/s. Jain Ispat, there is no denial that M/s. Jain Ispat has been the dealer of scrap of M/s. ASL. Their premises also were got searched. The appellants defence against M/s. Jain Ispat has been discussed by the Adjudicating Authority in para 16 of order under challenge whereof it has been appreciated that the lorry receipts recovered from M/s. Jai Ispat premises were fabricated as the name of transport company and the telephone numbers mentioned in those lorry receipts were found bogus. Based upon the said evidence only the adjudicating authority had held that objective of the invoices issued by M/s. Jain Ispat and the said false lorry receipts were intended to assist M/s. ASL to avail the CENVAT credit on the goods fraudulently.

8. The Transporter of M/s. G L Roadlines, M/s. Annapurna Roadlines, have clearly denied the transportation of goods of M/s.

Jain Ispat through their roadlines to M/s. ASL. The appellants have not produced any one for cross examination except mere reliance upon the cross examination of Shri Lal Singh Kourav, proprietor of M/s. Annapurna Road lines Pithampur. But the said cross examination when read in the light of his entire submissions the only outcome is M/s. Annapurna Roadlines have not provided any transportation facility to transport any goods from M/s. Jain Ispat to M/s. ASL. The recovered documents from M/s. ASL, on the contrary, rather shows receipts of inputs from M/s. Jain Ispat during the period from 28.2.2008 to 21.3.2008 under the cover of lorry receipts of M/s. Annapurna Roadlines, proprietor Shri Lal Singh Kourav. Hence, I do not find any infirmity in the findings of the Adjudicating Authority as against M/s. Jain Ispat when a penalty of Rs. 10,00,000/- has been imposed upon them. Order to that extent is hereby upheld.

9. Coming to the evidence against M/s. K G Ispat Ltd., admittedly no search was conducted in the premises of M/s. K G Ispat. Though the documents recovered from M/s. ASL are showing receipt of inputs under the invoices issued by M/s. K G Ispat during the period 2.5.2008 to 31.08.2008 but the documents recovered from M/s. ASL could not be corroborated from any of the documents from M/s. K G Ispat as no recovery from their premises was made by the department. No doubt the Director of M/s. ASL while deposing involvement of M/s. Jain Ispat has simultaneously named M/s. K G Ispat as well, but the only factum as far as M/s. K G Ispat is concerned is that there is nothing more than the third party evidence against M/s. K G Ispat.

10. The director of M/s. K G Ispat Shri Raj Kumar Gupta in his statement dated 28.5.2009 deposed that MS ingots(HC) cannot be used for rolling purpose. M/s. K G Ispat was admittedly the supplier of MS ingos (HC). No chemical report has been produced by the department to falsify the statement of Shri Raj Kumar

Gupta. The statement of Shri Amit Shukla, Manager (Finance) of M/s. Raj Ratan Castings (P) Ltd. who was supplying the MS Ingots (HC) to M/s. K G Ispat also cannot be relied upon in absence of chemical analysis report or any other technical verification. Mere 3rd party evidence cannot be relied upon to fasten the penalty. Penalty upon M/s. K G Ispat is held to have wrongly been imposed.

11. In view of the above discussions, penalty imposed on M/s. Jain Ispat has been upheld while the penalty of Rs 10 lakh imposed on M/s. K G Ispat is hereby set aside. As a result, the appeal of M/s Jain Ispat is hereby rejected and the appeal filed by the M/s. K G Ispat stands allowed.

(Pronounced in the open Court on 22.03.2022)

(RACHNA GUPTA)
MEMBER (JUDICIAL)

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