IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.

Date of Hearing/Decision: 01.06.2017

Appeal No.E/1709/2010-EX[SM],E/1956/2010-EX[SM],E/2018/2010-EX[SM],E/2019/2010-EX[SM],E/2030/2010-EX[SM],E/2088/2010-EX[SM],E/2956/2010-EX[SM]

(Arising out of Order-in-Original No. 06/D-I/2010 dated 12.04.2010 passed by the Commissioner of Central Excise, Delhi-I)

Appellant
Shri Surender Mohan Gambhir, Shri Abhay Kumar Jain, Shri Alok Jain, Shri Rajive Jain, Shri Narendra Gupta, Shri Surendra Bhuraria, SHri Lalit Kumar Seth,

Vs.

Respondent

CCE, Delhi I

Appearance

-For The appellant

Shri Jitender Singh for Surender Mohan Gambhir
Ms Seema Jain for Shri Abhay Kumar Jain and Alok Jain
Shri V. R. Sethi for Rajeev Jain
Shri Rajesh Rawal for Shri Narendra Gupta
None appeared for Shri Surendra Bhuraria and Lalit Kumar

Shri G.R. Singh, D.R. - for the respondent

CORAM: **Hon'ble Mr. Ashok K. Arya, Member (Technical)**

Final Order No. _ 53794-53800/2017_

Per Ashok K. Arya :

1. The appellants namely,

i. Shri Surinder Mohan Gambhir

ii. Shri Abhay Kumar Jain

iii. Shri Alok Jain

iv. Shri Rajeev Jain

v. Shri Narendra Gupta

vi. Shri Surendra Bhuraria

vii. Shri lalit Kumar Sethi

are in appeal against Order in Original 06/2010 dated 12/04/2010 whereunder Inter alia penalties have been imposed on the appellants.

2. The brief facts are that:

i. Certain persons namely, *M/s Sulabh Impex Corporation, M/s Ganpati Trading Link and M/s S.R.D. Exim.* Pvt. Ltd, who are registered dealers, were issuing Cenvatable invoices to various manufacturers for fraudulent availment of inadmissible Cenvat credit.

ii. The Department started investigations and conducted searches at various premises. On conclusion of the investigation, the Department issued show cause notice dated 04/01/2007 to various noticees including present appellants

iii. The show cause notice inter alia proposed recovery of various amounts of Cenvat credit, which were wrongly availed based on the 'fake invoices' where the goods mentioned in invoices were not received by the manufactures.

iv. The show cause notice was adjudicated by the impugned order in original whereunder inter alia the penalty of Rs. 5 lakhs each has been imposed on each of these appellants.

v. Therefore, these appellants are in appeal before the Tribunal.

3. There is none present for the appellant, Shri Surender Bhuraria and Shri Lalit Kumar Seth. For other appellants, the matter has been represented by the Ld Advocates, Shri Jitendra Singh, Ms. Seema Jain, Shri V.K. Sethi and Mr. Rajesh Rawal. The Revenue has been represented by the Ld. DR, Shri G.R. Singh.

4. The facts of the case and submissions of the parties involved have been carefully considered. The penalty imposed on the respective appellants is under the provisions of the then Rule 26 of Central Excise Rules, 2002. Rule 26 as it existed during the relevant time is given below:

Rule 26: Penalty for certain offences -

> *Any person who acquires possession of, or is 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 confiscate under the Act or these rules, shall be liable to a penalty not exceeding the duty on such goods or rupees ten thousand whichever is greater.*

4.1 The Ld. Advocates for the appellants plead that in respect of their offence, there were no excisable goods in existence;

therefore, provisions of the then Rule 26 for imposing penalty on them are not applicable. In this regard, they have cited in support Hon'ble Bombay High Court decision in case of *Commissioner of Central Excise Vs Ramesh Kumar Rajesh Kumar & Co. 2015* (325) ELT 506 (Bom.) and the Tribunal's decision in case of *V.K. Enterprises Commissioner of C.EX., Panchkula 2010 (249*) ELT 462 (Tri-Del).

4.2. However, the Ld. DR for the Revenue vehemently pleads that provisions of Rule 26 are applicable for the activities conducted by the present appellants as the wordings in Rule 26 are " any person…….., or in any other manner deals with….."The Ld DR, therefore, pleads that the penalty has rightly been imposed under Rule 26 of Central Excise Rules, 2002.

4.3. During the hearing it was pointed out that Rule 26 was amended with effect from 1st March,2007, when a new Sub-Rule '2' was added.

4.4. After having gone through provisions of Rule 26 as it existed prior to 1st March, 2007 and after March, 1, 2007, when insertion of sub-rule '2' was made in Rule 26, it is clear that the offences concerning issual of excise duty invoice and also issual of any other document without delivery of the related goods for availing/taking ineligible benefit under law of Central Excise in the form of Cenvat credit or otherwise; or abetment of making invoices/ documents for availing said ineligible benefit have been made liable to penalty under Rule 26 (2) of Central Excise Rules. Rule 26 as it existed prior to 1st March, 2007 only talks about **excisable goods** where the person concerned knows or has reason to believe that much excisable goods are liable to confiscation under the law of Central Excise, if it is so, then only the person concerned is liable to penalty under Rule 26 as it existed prior to 1st March, 2017.

4.5. The activities conducted by the appellants which have been penalized under old rule 26 (as it existed prior to 1st March, 2007) pertained to the period prior to 1st March, 2007 i.e. period of the contraventions/ offences is during 2003 to 2005. As the facts stand, there are no physical excisable goods concerning the appellants. The appellants have dealt with directly or indirectly only with the issual of fake invoices on which wrong Cenvat credit was taken by the manufacturers, who have also been issued the notice. During the hearing it has been mentioned that said wrong Cenvat credit taken by the respective manufacturers has been paid back to the exchequer during investigation stage only.

4.6. For similar facts , the Hon'ble Bombay High Court in the case of Ramesh Kumar Rajendra Kumar & Co. (supra) observes as under:

> 9. The view of ours taken herein is in consonance with the legislative change. In the Central Excise Rules, 1944, Rule 26 came to enacted which came in force with effect from 1st March, 2007. Rule 26 reads as under:
>
> > *Any person who acquires possession of, or is 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 confiscate under the Act or these rules, shall be liable to a penalty not exceeding the duty on such goods or rupees ten thousand whichever is greater.*
> >
> > *(2) Any person, who issues-*
> >
> > *(i) an excise duty invoice without delivery of the goods specified therein or abets in making such invoice; or*
> >
> > *(ii) any other document or abets in making such document, on the basis of which the user of said invoice or document is likely to take or has taken any ineligible benefit under the Act or the rules made thereunder like claiming of Cenvat credit under the Cenvat Credit Rules, 2004 or refund, shall be liable to a penalty not exceeding the amount of such benefit or five thousand rupees, whichever is greater."*
>
> 10. Perusal of the aforesaid rule, which is brought on the Statute book with effect from 1st March, 2007, specifically, brings within its fold a person issuing an excise duty invoice without delivery of the goods specified therein or abets in making such invoice or any other documents or abets in making such document, on the basis of which the user of said invoice or document is likely to take or has taken any ineligible benefit under the Act or the Rules made thereunder like claiming of Cenvat credit or refund is made to be liable to penalty not exceeding the amount of such benefit or five thousand rupees, whichever is greater. It is, thus, clear that in order to bring within its fold, the case of a present nature. Rule 26 enacted in March, 2007 whereas in the year 1995 when the show cause notice in question was issued, the said rule was not in the statute book. Consequently, the present case needs to be considered on the basis of text of Rule 209A of the Rules and not on the basis of Rule 26 of the Rules referred hereinabove.

4.6.1 Similarly, the Tribunal in the case of V. K. Enterprises (supra) inter alia observes as under:

> Penalties have been imposed on the appellants Shri Satpal Singh, the broker and commission agent, and Shri Vijay Goel under Rule 26 of the Central Excise Rules. Unlike the dealers, the brokers have dealt with the goods only as a link between the buyer and the seller of the goods. They were not required to Register themselves with Excise authorities and no violation of any obligation on their part has been cited. Therefore, we are of the view that role of the brokers may not attract the provisions Rule 26, before the amendment.

4.7. Considering the fact that issual of invoices/documents, and the abetment in making such documents leading to claiming/taking of ineligible benefit of Cenvat credit etc. by an assessee was not liable to penalty during the relevant period under the then Rule 26 of Central Excise Rules, and following the Tribunal's judgment in case of *V.K. Enterprises* (supra) and Hon'ble Bombay High Court judgment in case of *Ramesh Kumar Rajendra Kumar & Company* (supra) the penalties imposed on the present appellants are set aside.

5. In the result, the impugned order is modified to above effect and appeals allowed accordingly.

(Dictated & pronounced in open Court)

(Ashok K. Arya)
Member (Technical)

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