CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

WEST BLOCK NO.2, R.K. PURAM, NEW DELHI-110066

<u>BENCH-SM</u>

<u>COURT –IV</u>

<u>Excise Appeal No.E/2570/2011- [SM]</u>
<u>Excise Appeal No.E/51518/2017- [SM]</u>

[Arising out of Order-in-Appeal No. IND/CEX/000/APP/205/2011 dated 25.07.2011 passed by the Commissioner (Appeals), C. Ex., Indore.]

M/s. Gwalior Sugar Co. Ltd. & Ors. …Appellant
Jitender Singh Kushwaha

Vs.

C.C.E., Indore … Respondent

Appearance:
Mr. Abhishek Jaju, (Advocate) for the Appellant
Mr. K. Poddar, DR for the Respondent

CORAM:
Hon'ble Mr. S.K. Mohanty, Member (Judicial)

Date of Hearing.16.11.2017
Date of Decision.27.11.2017

<u>Final Order No. 58132-58133/2017</u>

<u>Per S.K. Mohanty</u>:

The Appellant No. 1 M/s. Gawalior Sugar Co. Ltd has filed this appeal against the impugned order, wherein redemption fine and penalties were confirmed by the ld. Commissioner (Appeals) under Rule 25(1) of the Central Excise Rules, 2002 read with Section 11 AC of the Central Excise Act, 1944. Further, the appellant No. 2 Shri Jitneder Singh Kushuwha, the authorized signatory of the appellant No.1 has filed this appeal against imposition of penalty under Rule 26 *ibid.*

2. Brief facts of the case are that the appellant No.1 is a manufacturer of Sugar, falling under Chapter 17 of the Central Excise Tariff Act, 1985. During February 2009, the appellant had removed the excisable goods without payment of Central Excise duty amounting to Rs. 10,42,419/- within stipulated time frame. While scrutinizing ER-1 returns, the Range superintendent of Central Excise had informed the appellant regarding such irregularities. Thereafter, the appellant had partly deposited the duty amount of Rs. 50,000/- on 31.03.2009 and 28.04.2009 through the TR-6 Challans for non-payment of the remaining amount of admitted duty liability, the Department proceeded against the appellant for confirmation of such demand. After issuance of the SCN, the matter was adjudicated vide order dated 22.03.2011, wherein Central Excise duty demand of Rs. 10, 42, 419/- along with interest was confirmed against the appellant. Besides, 11039 bags of free sugar valued at Rs. 2,19,39,610/- and 31 bags of Levy Sugar valued at Rs. 44,143/- were confiscated, with the option to the appellant to redeem the same on payment of redemption fine of Rs. 25 lacs. Further, the adjudication order also imposed penalty of Rs. 5 lacs. on the appellant No. 1 and Rs. 1 lac on the appellant No. 2 under Rule 25 and 26 *ibid* respectively. On appeal against the adjudication order, the ld. Commissioner (Appeals), Customs Central Excise and Service Tax, Indore vide the impugned order dated 22.07.2011 has modified the adjudication order to the extent of reducing the quantum of redemption fine and penalty in the case

of appellant-1 from Rs. 25 lacs. to Rs. 5 lacs and 5 lacs to 1 lac respectively. However, the impugned order has upheld the amount of penalty confirmed against the appellant No.2. Feeling aggrieved with the impugned order, both the appellants have field appeal before the Tribunal.

3. The ld. Advocate appearing for the appellant submitted that due to severe financial crisis faced by the appellant Company, the admitted duty liability could not be deposited within the stipulated time frame. He also submitted letter dated 16.12.2010 and 16.03.2011 addressed to the jurisdictional Central Excise authorities, informing the reason of non-payment of service tax within the statutory time limit. He also submitted that the appellant had subsequently deposited the balance amount of duty alongwith interest. He further submitted that the appellant no-1 had informed the Central Excise Department through the ER-1 return that it is not in a position to pay the admitted duty liabitly within the schedule time. It is his further submission that since non-payment on tax within the statutory time frame is not attributable to the reason of fraud, collusion, willful mis-statement etc, with the intent to defraud the Government Revenue, the provisions of Rule 25 *ibid* read with Section 11 AC *ibid* cannot be invoked for imposition of redemption fine and penalty in respect of the appellant No-1. With regard to the appellant No.2, the ld. Advocate submitted that he had no role in non-payment of duty; thus, personal penalty cannot be imposed against him under Rule 26 *ibid.* To support such stand, the ld. Advocate has relied on the

judgment of Hon'ble Gujarat High Court in the case of Commissioner of Central Excise Customs VS. Saurashtra Cement Ltd. 2010 (260) E.L.T. 71 (Guj.) and affirmed by Hon'ble Supreme Court reported in 2013 (292) E.L.T. A98 (SC.)

4. On the contrary, the ld. DR appearing for the Revenue reiterated the findings recorded in the impugned order and further submitted that since the tax liability was not discharged within the stipulated time, the provisions of the Central Excise statue have been violated by the appellants and thus, confiscation of goods and imposition of redemption fine and penalties by the authorities below are in consonance with the statutory provisions.

5. Heard both sides and perused the records.

6. I find the at the time of filing the ER-1 return for the relevant period, the applicant had sated the reason of non-payment on admitted tax liability within the stipulated time. The ld. Advocate has also produced the acknowledge copy of ER-1 return, indicating such reason before the Bench. Further, I also find that the appellant had deposited the interest amount for delayed payment of duty. Thus, it is evident that there is no element of suppression, mis-statement, fraud etc, on the part of the appellant No-1 in defrauding the Government Revenue. However, non-payment of duty amount within the time frame will attract the penal consequences provided under Rule 27 *ibid*. Since the adjudicating authority has not imposed any penalty under Rule 27 *ibid*, I am not expressing any opinion regarding

imposition of penalty under such provisions. Thus, I am confining my findings only to the question of confiscation of goods, imposition of redemption fine and penalty on the appellant.

7. Applicability of Rule 25 *ibid* in the identical situation, came up for consideration before the Hon'ble Gujarat High Court in the case of Saurashtra Cement Ltd. (supra), wherein upon analysis of the statutory provisions, the Hon'ble Court held in the absence of intention to evade payment of duty, the provision of Rule 25 read with Section 11 AC *ibid* cannot be invoked for imposition of fine and penalty. Relevant paragraphs in the said judgment are extracted herein below:

> ***"16.*** *The Tribunal considering Rule 25 has observed in its order that Rule 25 provides for imposition of penalties which shall not exceed the duty on the excisable goods, when there is contravention of the nature referred to in clause (a), clause (b), clause (C) or clause (d). The Tribunal found that clause (a) of Rule 25 refers to removal of excisable goods in contravention of any of the provisions of the Rules. When goods were removed, no excise duty was required to be paid at that point of time. As such, it cannot be said that the contravention of the nature mentioned in the said clause has been committed by the assessee. Clause (b) is to the effect that the manufacturer does not account for any excisable goods manufactured by him. The said clause does not stand contravened inasmuch as the goods were duly reflected in the statutory records. Similarly, clause (c) does not stands contravened inasmuch as the assessee has not manufactured goods without applying for registration. Clause (d) refers to contravention of any of the provisions of the Rules with intent to evade payment of duty. Excisable goods were entered in records, cleared on Central Excise invoices and duty was also paid subsequently,*

though belatedly along with interest. As such, the said clause (d) is also not contravened. After analyzing and examining all these four sub-clauses of Rule 25, keeping in mind the facts of the case, the Tribunal held that the invocation of Rule 25 for imposition of penalty for delayed deposit of duty is not in accordance with law.

17. *It is also to be borne in mind that Rule 25 starts with the word "Subject to the provisions of Section 11AC...........". Section 11AC of the Central Excise Act deals with penalty for short levy or non-levy of duty in certain cases. It says that where any duty of excise has not been levied or paid or has been short levied or short paid or erroneously refunded by reasons of fraud, collusion or any willful misstatement or suppression of facts, or contravention of any of the provisions of this Act or of the Rules made thereunder with intent to evade payment of duty, the person who is liable to pay duty as determined under sub-section (2) of Section 11AC, shall also be liable to pay a penalty equal to the duty so determined. For the purpose of invoking Section 11AC of the Act, the condition precedent is that the duty has not been levied, or paid or short-levied or short-paid or the refund is erroneously granted by reasons of fraud, collusion or any willful misstatement or suppression of facts. If these ingredients are not present, penalty under Section 11AC cannot be levied. Since Rule 25 can be invoked subject to the provisions of Section 11AC of the Act, as a natural corollary, the ingredients mentioned in Section 11AC are also required to be considered while determining the question of levying of penalty under Rule 25 of the Central Excise Rules.*

24. *In view of the above discussion and legal position emerging therefrom, we have no hesitation in confirming the orders passed by the Tribunal and dismissing all these Appeals filed by the Revenue, by holding that there was no intention on the part of the respondent assessee to evade any payment of duty. It is only because of stringent financial condition, that the duty could not be paid in time and as soon as liquidity was available, duty was*

> *paid along with interest. The Tribunal has, therefore, rightly come to the conclusion that penalty could not be levied under Rule 25 of the Rules and for the alleged default, the penalty was restricted to Rs. 5,000/- in each matter under Rule 27 of the Rules. We, therefore, hold that no question of law, much less any substantial question of law arises out of the orders passed by the Tribunal.*

8. In view of the settle position of law, the impugned order, so far as it confirmed confiscation of goods, imposition of redemption fine and penalties on the appellants are set aside and the appeals are allowed in favor of the appellants.

(Pronounced in the open court on __27.11.2017)

(**S. K. Mohanty**)
Member (Judicial)

Sakshi