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

Date of Hearing/Order: 15.2.2018

Appeal No. E/1948-1949/2012-SM

(Arising out of Order-in-Appeal No. IND-CEX-000-APP-104 & 105-2012 30.3.2012 passed by the Commissioner (Appeals), Central Excise, Customs & Service Tax, Indore)

M/s Abu Cement Ltd. Appellant
Shri Sunil Kedia, Director

Vs.

CCE, Indore Respondent

<u>Appearance</u>

Shri Manish Saharan, Advocate - for the appellant

Shri K. Poddar, D.R. - for the respondent

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

Final Order No.50661-50662/2018

Per S.K. Mohanty :

These appeals are directed against the impugned order dated 30.3.2012 passed by the Commissioner (Appeals), Customs, Central Excise & Service tax, Indore.

2. The brief facts of the case are that the assessee appellant M/s Abu Cement Ltd. is engaged in the manufacture of cement and clinker, falling under Chapter 25 of the Schedule to Central Excise

Tariff Act, 1985. The assessee appellant avails Cenvat credit of Central Excise duty paid on the inputs and capital goods and service tax on the input services. The Central Excise officers paid a surprised visit to the factory premises of the assessee appellant on 1.8.2009, and on verification of the records, found that the finished goods available in the factory did not tally with the recorded entries in the RG-1 register. It was further detected that the appellant had not maintained the raw material register after 1.7.2009 and the finished goods register from 19.7.2009 till the date of visit of the officers. On the basis of investigation, the department recorded the statement from Shri Sunil Kedia, Director of the assessee appellant and prepared Panchnama on the spot. The excess stock of finished goods found available in the factory were seized. Subsequently, the department initiated show cause proceedings against the appellants for confiscation of the goods and for imposition of penalties. The matter was adjudicated vide order dated 9.1.2012, wherein the finished goods viz. ordinary Portland cement and clinker valued at Rs. 15,49,820/- were confiscated, with the option to redeem the same on payment of redemption fine of Rs. 8 lakhs. Further, the adjudication order also imposed penalty of Rs. 4 lakhs under Rule 25 (1) of Central Excise Rules, 1994 on the assessee appellant and Rs. 4 lakhs on Shri Sunil Kedia, Director of the assessee appellant under Rule 26 of the Rules. The ld. Commissioner (Appeals) vide the impugned order has upheld the adjudged demand confirmed against the appellant. Hence, the appellants have filed these appeals before the Tribunal.

3. The ld. Advocate appearing for the appellant submits that at the material time of dispute, the maternal uncle of the Director, Shri Sunil Kedia suddenly fell ill and his condition was deteriorated. The appellant remained present with him all along, and as a result, he could not take proper steps to maintain the daily stock account on regular basis. He also referred to paragraph 3.12 in the impugned order, wherein such submissions of the appellant has been recorded by ld. Commissioner (Appeals). The ld. Advocate further relied on the certificate dated 12.4.2010 issued by M/s ABN & Company, the Chartered Accountant firm, wherein they have clarified that the closing stock as on 31st July 2009 in respect of clinker (WIP) was 693.941 MTs and cement (finished goods) was 48.900 MT. Thus, he submits that non-maintenance of record during the intervening period cannot tantamount to the removal of goods clandestinely without payment of duty. He accordingly, submits that the goods cannot be confiscated and penalties cannot be imposed on the appellants. To support such stand, the ld. Advocate has relied on the judgement of Hon'ble Gujarat High Court in the case of ***CCE Vs. Saurashtra Cement Ltd.*** – 2010 (260) ELT 71 (Guj.) and also the decisions of this Tribunal in the case of ***Industrial Thermo Pack*** –

2015-TIOL-1468-CESTAT-DEL. and ***Salasar Steel and Power Ltd.*** – 2017-TIOL-268-CESTAT-DEL.

4. On the other hand, the ld. DR appearing for the Revenue reiterates the findings recorded in the impugned order and further submits that since, the appellant had contravened the provisions of Rule 25 of the Central Excise Rules, 2002 in non-maintaining the production register on regular basis, it is exposed to the penal consequences provided under the statute.

5. Heard both sides and perused the case records.

6. On perusal of both the adjudication as well as the impugned order, I find that the authorities below have recorded the statement of the Director, the appellant No. 2 herein, stating that he has accepted that the excess found stock was kept in the factory premises, with an intention to remove the same clandestinely, without payment of Central Excise duty. However, on verification of the statement recorded from Shri Sunil Kedia on 1.8.2009, I find that no such statements were furnished by him before the Central Excise officers. Thus, I am surprised as to how the authorities below have recorded such fact, which is not emanating from the statement recorded by the officers of the department on the spot from the Director of the company. I also find that the authorities below have

not recorded any findings with regard to the certificate dated 12.4.2010, furnished by the Chartered Accountant regarding the availability of stock as on 31.7.2009 and the submissions regarding the illness of the maternal uncle of the Director. In absence of any credible evidence regarding the intention to remove the goods in clandestine manner, I am of the view that imposition of redemption fine and penalties cannot be sustained in the eyes of law.

7. With regard to confiscation of excisable goods and imposition of fine/penalty under Rule 25 ibid, the law is well settled that in absence of the ingredients like suppression, or wilful mis-statement as provided under Section 11AC of the Central Excise Act, 1994, the provisions of Rule 25 ibid cannot be invoked. In this context, the Hon'ble Gujarat High Court, in the case of ***Saurashtra Cement Ltd.*** (supra), while setting aside the penalty imposed under Rule 25 ibid have held as follows:

> "**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.

18. This issue has come up before the Andhra Pradesh High Court in case of *Commissioner of C. Ex. Guntur* v. *Andhra Cements Limited* (supra) wherein the Court has taken the view that as per Rule 25(d) of the Rules subject to the provisions of Section 11AC of the Act, if any producer, manufacturer, registered person of a warehouse or a registered dealer, contravenes any of the provisions of these rules or the notifications issued under these rules with intent to evade payment of duty, he is liable to pay the penalty in terms of Rule 25 of the Rules. The Court further observed that a bare perusal of this Rule would suggest that evasion of payment of duty is not sufficient to impose penalty on a producer or manufacturer. There should be an element of intention to evade payment of duty. Unless the authorities come to the definite conclusion that there was an intention to evade the payment of duty, a penalty cannot be imposed. Considering the facts before the Andhra Pradesh High Court, the Court observed that there is a finding of the Tribunal that the circumstances were beyond the control of the respondent-company as the matter was pending before BIFR, and as such, the amounts could not be deposited by the respondent-company within time and as soon as it was in a position to make the payment, the respondent-company made the payment not only of the duty, but also the interest calculated under Rule 8(3) of the Rules. The Court, therefore, come to the conclusion that the Tribunal has correctly interpreted Rule 25 of the Rules and the penalty cannot be imposed on the assessee company.

19. A similar issue has come up before the Kerala High Court in the case of *Superintendent of Central Excise* v. *Sance Pharmaceuticals* (supra). The Court in that case was concerned with issuance of show-cause notice and levy of penalty under Rule 173GG of erstwhile Central Excise Rules, 1944. The Division Bench of the Kerala High Court while confirming the order and judgment of the learned single judge, setting aside the penalty, has held that the learned single judge has correctly applied the law laid down by the Apex Court that penalty should not be imposed in absence of willful intention to evade payment of tax or duty, as the case may be. The Court further held that it is trite law that even the statute provides for imposition of penalty when there is failure to pay duty within the statutorily prescribed period, such imposition of penalty should be preceded by a finding that there was a willful default as such and in the case before the Kerala High Court, the deficit duty had been paid along with interest even before the issuance of the show-cause notice. The appellate authority had also found absence of any intention to evade payment of duty. The Court, therefore, took the view that the orders of penalty were not sustainable and rightly interfered with by the learned single judge.

20. Even in the case of *Supreme Industries Limited* v. *CESTAT, New Delhi* (supra), the Madhya Pradesh High Court took the view that enforcement of penal clause to be done subject to strict proof of intention to evade payment of duty. In the case before the Madhya Pradesh High Court, there was no material to show that there was intention to evade duty. The goods manufactured were not subject to quality control test and were kept on hold. The goods were to be cleared by quality control department and only thereafter were to be sent to packing department after quality control test was concluded. Merely because in statement, the Commercial Manager of petitioner in that case has stated that goods were manufactured, that by itself cannot be a ground for holding that goods were ready for despatch to customer. The Court, therefore, took the view that confiscation and penalty is not sustainable under Rule 173Q of erstwhile Central Excise Rules, 1944.

21. The Apex Court judgment in the case of *Union of India* v*. Rajasthan Spinning & Weaving Mills*, 2009 (238) E.L.T. 3 (S.C.) also supports the case of the respondent assessee. The Apex Court after reproducing Section 11AC in the judgment, took the view that the main body of Section 11AC lays down the condition and circumstances that would attract penalty and the various proviso enumerate the condition, subject to which and the extent to which the penalty may be reduced. The Court further took the view that the penalty provision of Section 11AC would come into play only after recording a finding that the escaped duty was the result of deception by the assessee by adopting a means as indicated in Section 11AC. The penalty under Section 11AC is punishment for an act of deliberate deception by the assessee with the intent to evade duty by adopting any of the means mentioned in that section. The Court further held that Section 11AC would not apply to every case of non-payment or short payment of duty regardless of the conditions expressly mentioned in the section for its application.

22. It is also relevant to mention here that applicability of Rule 25 is subject to the provisions of Section 11AC of the Act. The term "subject to" in the context assumes some importance. The Apex Court in the case of *Commissioner of Ce. Ex., Bhavnagar* v. *Saurashtra Chemicals Limited*, 2007 (212) E.L.T. 7 (S.C), after referring to its earlier decisions observed that the term "subject to" is an expression whereby limitation is expressed. It is further observed that the expression "subject to" must be given effect to.

23. In *K.R.C.S. Balakrishna Chetty and Sons & Co.* v. *The State of Madras,* AIR 1961 SC 1152, the Apex Court took the view that on a proper interpretation of Section 5 of Madras General Sales Tax Act, 1939, the expression "subject to" only means that the exemption under the licence is conditional upon the observance of the conditions prescribed and upon the restrictions which are imposed by and under the Act whether in the rules or in the license itself; that is, a licensee is exempt from assessment as long as he conforms to the conditions of licence and not that he is entitled to exemption whether the conditions upon which the license is given are fulfilled or not. The use of the words "subject to" has reference to effectuating the intention of the law and the correct meaning, is "conditional upon". The observance of conditions of licence is necessary for the availability of exemption under Section 5. Where the licensee contravenes the conditions of the licence or Act or the rules, he becomes liable to pay the tax, notwithstanding that a license is issued to him under Section 5.

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. I also find that this Tribunal in the case of ***Industrial Thermo Pack*** (supra) and ***Salasar Steel and Power Ltd.*** (supra), under identical set of facts of non-maintenance of proper records, has set aside the redemption fine and penalty, holding that there was no deliberate or mala fide intention to remove the goods clandestinely.

9. As discussed above, since the goods cannot be confiscated, there is no question of imposition of penalty on the Director of the assessee-appellant under Rule 26 ibid.

10. Therefore, I do not find any merits in the impugned order, so far as it confirmed imposition of redemption fine and penalties on the appellants. Accordingly, after setting aside the same, I allow the appeals in favour of the appellants.

(Dictated & pronounced in open Court)

(S.K. Mohanty)
Member (Judicial)

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