IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

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

BENCH-SM

COURT –III

Excise Appeal No. E/51346/2018 [SM]

[Arising out of Order-in-Appeal No. BHO-EXCUS-002-APP-512-17-18 dated 21.03.2018 passed by the Commissioner (Appeals), CGST & Central Excise, Raipur]

M/s Brij Textile Company …Appellant

Vs.

C.C.E. & ST, Raipur … Respondent

Present for the Appellant : Mr. J.M. Sharma, Advocate
Present for the Respondent: Mr. H.C. Saini, D.R.

Coram: HON'BLE MRS. RACHNA GUPTA, MEMBER (JUDICIAL)

Date of Hearing/Decision: 29.06.2018

FINAL ORDER NO. 52426/2018

PER: RACHNA GUPTA

Present is an Appeal against the Order of Commissioner (Appeals) dated 21.03.2018 vide which the penalty leviable in terms of proviso to Section 11 AC(c) of the Central Excise Act (CEA in short), 1944 has been confirmed.

2. The facts relevant for the adjudication are that the appellant is engaged in manufacture of nylon fabric and they are also availing cenvat credit under Cenvat Credit Rules, 2004. During an audit in August, 2015 it was noticed that the

appellant had availed and utilized the cenvat credit of Basic Customs Duty, Customs Education Cess and Customs Secondary And Higher Education Cess totalling to Rs. 15,37,828/-. The same was alleged to have been wrongly availed. Show Cause Notice dated 20.12.2016 was issued. Perusal thereof shows that the alleged availment of the above said amount was got redeposited by the appellant with the Department alongwith the interest even prior the issuance of Show Cause Notice. Due to the said reason, the original Adjudicating Authority vide the Order dated 12.06.2017 had dropped the proceedings initiated against the appellant vide the said Show Cause notice. However, Commissioner(Appeals) vide the Order under challenge has confirmed the demand of the said Show Cause Notice alongwith the imposition of the penalty under Section 11 AC(c). Resultantly, the present Appeal.

3. I have heard Shri J.M. Sharma, Ld. Advocate for the appellant and Shri H.C. Saini, Ld. DR for the Department. It is submitted on behalf of the appellant that the appellant has availed the cenvat credit under mis-interpretation of the provision however, under bonafide belief. The moment it was pointed out by the Department during the audit that the cenvat credit has been wrongly availed and utilized, the same was paid back to the Department along with the interest. In such circumstances, even Show Cause Notice ought not to have been issued. However, the Department still opted to

adjudicate and while finalizing the adjudication rather against the appellant, it is alleged that the Order under challenge has patent errors on its record. In addition, the appellant has submitted that the impugned Show Cause Notice is hit by limitation. Both the adjudications of Hon'ble Supreme Court in **Union of India vs. Rajasthan Spinning and Weaving Mills 2009 (238) ELT 3 (S.C.)** as well as in the case of **Union of India vs Dharamendra Textile Processors 2008 (231) ELT 3 (S.C.)** have wrongly been relied upon. Order accordingly is prayed to be set aside and Appeal is prayed to be allowed.

4. Ld. DR while rebutting these arguments has submitted that the deposit in the present case is not a *suo moto* act of the appellant rather the deposit of wrongly utilized cenvat credit was made only after the audit team of the Department noticed it and asked the appellant to Act accordingly. The admission on the part of the appellant is sufficient to hold these mis-representation on his part for the simple reason of evasion of duty. It is also submitted that the said availment was never shown by the appellant in their returns which is sufficient to hold suppression of facts and once both these elements are available, the Commissioner (Appeals) has rightly invoked Section 11AC (1a) of CEA. It is submitted where there was an apparent admission, there was no need for the Department to look into for another evidence. While justifying the Order, the Appeal is prayed to be allowed.

5. After hearing both the parties, I am of the opinion as follows:

It is an apparent and admitted fact that the amount of cenvat credit as is alleged by the Department to have been wrongly availed, was deposited by the appellant alongwith the interest much within the reasonable time of it being brought to the notice of the appellant and much before the issuance of the impugned Show Cause Notice. It is apparent that the said deposit was made almost 15 months prior the said Show Cause Notice. In view of said admitted fact, the only adjudication remains is as to whether the Commissioner (Appeals) has rightly invoked Sub Section C of Section 11 AC of CEA or the facts of the case takes the appellant to fall under Sub Section A of 11AC of CEA. For the purpose, the provision is necessary to be looked into. It is reproduced as follows:

> Section 11AC
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> (1) The amount of penalty for non-levy or short-levy or non-payment or short-payment or erroneous refund shall be as follows:-
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> (a) Where any duty of excise has not been levied or paid or has been short-levied or shortpaid or erroneously refunded, for any reason other than the reason of fraud or collusion or any willful mis-statement 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 (10) of section 11A shall also be liable to pay a penalty not exceeding 10% of the duty so

determined or rupees five thousand, whichever is higher:

Provided that where such duty and interest payable under Section 11AA is paid either before the issue of Show Cause Notice or within 30 days of issue of Show Cause Notice, no penalty shall be payable by the person liable to pay duty or the person who has paid the duty and all proceedings in respect of said duty and interest shall be deemed to be concluded;

(c) where any duty of excise h as not been levied or paid or has been short-levied or shortpaid or erroneously refunded, by reason of fraud or collusion or any willful mis-statement 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 (10) of Section 11A shall also be liable to pay a penalty equal to the duty so determined: Provided that in respect of the cases where the details relating to such transactions are recorded in the specified record for the period beginning with 8th April, 2011 up to the date on which the Finance Bill, 2015 receives the assent of the President (both days inclusive), the penalty shall be 50% of the duty so determined;

It is also observed that Sub-Section A of 11AC had certain amendments w.e.f. 14.05.2015 as has been shown in bold in the above provision. The perusal thereof makes it abundantly clear that in case the duty alongwith the interest is paid before the issue of Show Cause Notice, or even within 30 days thereof, no penalty shall be payable by the person liable to pay the duty. The word used therein is 'shall' which makes it mandate for the Department to act accordingly.

6. The Commissioner (Appeals) has miserably overlooked the said mandate and therefore is opined to be wrong while jumping upon Sub-Section C of Section 11AC, CEA. The Sub Section C could have come into picture if and only if there had been some positive act observed by the Department, that too by way of cogent evidence to show that there was an element of *mensrea* of tax evasion available with the appellant while availing the impugned cenvat credit and even while utilizing the same, the Hon'ble Supreme Court in **Hindustan Steel Limited vs State of Orissa 1978 (2) ELT (J 159)(S.C.)** has held that no penalty should be imposed for any technical or breach of legal provisions or where the breach flows from the bonafide belief that the offender is not liable to act in the manner prescribed by the statute. In another case, **Tamil Nadu Housing Board vs CCE, Madras 1994 (74) ELT 9 (S.C.)** the Hon'ble Apex Court has held that the words and phrases i.e. fraud, collusion or any wilful mis-statement or suppression of facts or contravention of any of the provisions of the Act or the Rules made thereunder with intend to evade payment of duty must have to be explained beyond all reasonable doubts. The findings of Commissioner (Appeals) merely relying upon the deposit by the appellant of the

wrongly availed cenvat credit as an admission and a reason to not to search for the evidence qua the positive act of alleged fraud and mis-representation, to my opinion, is a finding based on the presumption and surmises. The same is therefore not sufficient to bring home the guilt of the appellant.

7. The authorities relied upon by the Department even in the case of **CCE, Bangalore vs Alsthom Instrument Transformers 2015(322)ELT 297 Karnataka** is also held not applicable to the facts of the present case, all these decisions being announced prior the amendment in Section 11AC(a) of CEA, 1944. In view of the entire above discussion, I hereby uphold the findings of original Adjudicating Authority and hereby set aside the findings of Commissioner (Appeals) i.e. the Order under challenge. As a result, the impugned order is set aside and the Appeal is hereby allowed.

[Dictated and pronounced in the Open Court]

(RACHNA GUPTA)
MEMBER (JUDICIAL)

D.J.