CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH AT HYDERABAD

Division Bench - Court No. – I

Excise Appeal No 2358 of 2011

(Arising out of **Order-in-Appeal** No. 33/2010 (H-IV) (D) CE, dated 23.08.2010 passed by Commissioner of Customs, Central Excise & Service Tax (Appeals-II), Hyderabad)

Kedia Electricals Ltd., .. **APPELLANT**
B/55 & 56, Assisted Pvt
Industrial Estate,
Balanagar,
Hyderabad- 500 037.

VERSUS

Commissioner of Customs, Central Excise and Service Tax- Hyderabad-IV .. **RESPONDENT**
Posnett Bhawan,
Tilak Road, Ramkoti,
Hyderabad,
Telangana – 500 001.

Appearance

Shri Y. Sreenivasa Reddy, Advocate for the appellant.

Shri N. Bhanu Kiran, Assistant Commissioner for the Respondent.

Coram: Hon'ble Mr. P.V. SUBBA RAO, MEMBER (TECHNICAL)
Hon'ble Ms. RACHNA GUPTA, MEMBER (JUDICIAL)

FINAL ORDER No. A/30612/2019

Date of Hearing:03.06.2019
Date of Decision:03.06.2019

[ORDER PER: MR. P.V. SUBBA RAO]

1. This appeal is filed against Order-in-Appeal No. 33/2010 (H-IV) (D) CE, dated 23.08.2010.

2. The facts of the case in brief are that the appellant herein is engaged in manufacture of fans and pressure cookers. After investigation by the Directorate General of Central Excise Intelligence, a show cause notice was issued to the appellant alleging that they had received invoices on which they have availed cenvat credit without actually receiving the corresponding goods. Learned Counsel for the appellant submits that the entire case

started with an investigation by the Directorate General of Central Excise Intelligence at the suppliers' end. During investigation, it was found by the officers that the suppliers had supplied the goods to some parties and have issued invoices in the name of some other parties in order to enable them to avail cenvat credit. While the investigation was conducted at the supplier's end the department also issued show cause notices to the recipients of the invoices including the appellant herein seeking to deny cenvat credit to them on the ground that they have received invoices without corresponding goods. The show cause notice in question notice was issued to the appellant herein as well as to M/s Agarvanshi Aluminium Ltd., Secunderabad and M/s Karnataka Metal Company, Secunderabad the alleged suppliers. Both the suppliers were called upon why penalty should not be imposed upon them under Rule 25 and 26 of Central Excise Rules, 2002 and Rule 13/15 of Cenvat Credit Rules, 2002/04 for allegedly supplying invoices without actually supplying goods. The show cause notice proposed to deny cenvat credit of Rs. 49,09,014/- to the appellant on the following grounds:

a) the suppliers M/s Agarvanshi Aluminium Ltd.,/Karnataka Metal Company Ltd., diverted the goods elsewhere and issued only invoices to the appellant.

b) the appellant does not require the material of the size and thickness for which invoices were issued to them.

c) the appellant had no rerolling and de-coiling facility to reduce the thickness of the aluminium sheets.

d) the Managing Director of the appellant Kedia had admitted that the facts in question are not useful for making fan blades.

3. After following due process, lower adjudicating authority dropped the demand and proposal for imposition of penalties against all the noticees. Against such an order, the department preferred an appeal before the First Appellate Authority only in respect of the appellant but not in respect of the co-noticees. Although the First Appellate Authority, in para 7.9 of the impugned order states "the respondent's contention that appeal was only filed against them and not on the AAL and KMC, is not correct, since the appeal is filed against all the recipients of show cause notice inasmuch as the show cause notice was set aside by the lower authority in his impugned order", it is evident that it is not so because the impugned order itself was marked to the appellant department and M/s Kedia Electricals, the respondent [the appellant in this appeal] but not to M/s AAL or KMC. The

First Appellate Authority set aside the order of the lower authority and hence this appeal.

4. Learned Counsel for the appellant submits that it is not in dispute that 95% of the total raw material which they used are received only from the two suppliers in question. It is also not in dispute that they have manufactured goods and exported. Evidently, it is impossible for them to have not received the inputs and still manufactured and exported the goods. Thus the department's allegation that they received only the invoices and not the goods has no force. Secondly, there is no evidence of that they got inputs from some other sources to cover the CENVAT invoices or cash payments by them. Thirdly, on the question of the appellant not requiring the material of the thickness in question for which the invoices were issued to them, he would draw the attention of the Bench to the order of the adjudicating authority in which it was clarified that the thick aluminium sheets which are not suitable for manufacture of fan blades were used by them in manufacture of cookers. Admittedly, cookers were also manufactured by them as can be seen from show cause notice itself. He would also submit that the thicker aluminium sheets were rerolled by them into thinner sheets and used for manufacture of fan blades. The allegation that the appellant had no re-rolling or de-coiling facility has also been dismissed by the adjudicating authority in his Order-in-Original in which he recorded that although appellant did not have the re-rolling or de-coiling facility when the statement was recorded, they had it before and the plant was subsequently shut down. The adjudicating authority has recorded, after perusing the records submitted by the appellant, that he is satisfied that they had the facility. He further submits that inputs in question can be used by them not for manufacture of blades but for manufacture of fan die castings as well as pressure cooker parts. Lastly, he would submit that the entire demand has been raised based on third party records and based on third party statements which are clearly not sustainable. After the show cause notice was issued, they had produced all their records before the adjudicating authority who, in paras 12-21, has given detailed findings with respect to each of the allegations made in the show cause notice after considering both the evidences produced in the show cause notice and those produced by the appellant during the personal hearing. He would submit that the entire findings of the adjudicating authority were dismissed by the First Appellate Authority in para 7.2 of the impugned order as follows:

> "As seen from the show cause notice issued to the recipients, I find that the investigating agency has conducted full proof investigation and conclusively put forth all the evidences in the show cause notice in respect of irregular availment of cenvat credit by the recipients in M/s Agarvanshi Aluminium Ltd., and Karnataka Metal Company Ltd., based on the input invoices issued by Agarvanshi Aluminium Ltd., and Karnatak Metal Company Ltd., without supplying the material mentioned in the said invoices, contrary to the statutory provisions contained in Cenvat Credit Rules 2002/2004 as detailed above."

5. He would submit that with respect to each of the allegations made in the show cause notice a specific finding based on the documentary evidence was given by the adjudicating authority which has been dismissed by the Commissioner (Appeals) without giving any reason as to why the order of the adjudicating authority was not correct with respect to such allegation. Therefore, he prays that the order of the First Appellate Authority may be set aside and their appeal may be allowed.

6. Learned DR reiterates the findings of the impugned order. He draws the attention of the Bench to the show cause notice and submits that the demand was raised after proper investigation which showed that the invoices were issued in the name of the appellant, corresponding lorry receipts showed delivery to the appellant premises and further lorry receipts onwards to Delhi/Gwalior. Further investigation showed that the goods have not reached the appellants premises at all and the lorry receipts were incorrect. On the question of thickness of the material being used he would submit that the material could not have been used by the appellant given the nature of the activity as admitted by the Managing Director himself. In his statement Managing Director had admitted that they had no facility for re-rolling/thick sheets of the aluminium. He also admitted that these sheets are not suitable for manufacture of blades by them. In view of the above, he would assert that the evidence produced by the appellant before the adjudicating authority was only an after thought and should not have been relied upon. The First Appellate Authority was correct in setting aside the order of the lower authority.

7. We have considered the arguments on both sides and perused the records. The issue before us is whether the sufficient evidence to allege that the appellant has not received the goods corresponding to the invoices on

which they have availed cenvat credit. It is a case of the Revenue that the investigation conducted by the DGCEI showed that the goods were supplied by the suppliers to some other party while the invoices were sent to the appellant. They relied on statement of M/s Kedia Managing Director of the appellant as well as several others in order to establish that the appellant had not received the materials in question. They further relied on the lorry receipts issued by the transporters with respect to the disputed invoices and assert that the goods have not reached the appellant's premises at all. The next point of dispute is that the goods in question could not have been used by the appellant at all for manufacture of fan blades and that they had no facility to re-roll the goods in question to appropriate thickness to use as fan blades. Therefore, Revenue asserts that not only have the goods not reached the appellant but they also could not have used them because they were not suitable for their products. We find that all these issues have been addressed by the adjudicating authority in his detailed findings. As far as question of the goods being suitable for manufacture of fan blades is concerned is recorded that both the goods in question cannot be used for manufacture of fan blades but they could have been used for pressure cookers which is also one of the products of the appellant. On the question of re-rolling or de-coiling, he recorded that the appellant, based on the documents presented before him, held that they had the facility for re-rolling and had subsequently shut it down. He also found that the appellant could have used this for manufacture of other parts of the fans other than blades. Under these circumstances, we find that adjudicating authority has examined the matter in depth and has not found sufficient evidence to substantiate the allegation that the assessee has not received the goods in question covered by the invoices. We also notice that all the alleged suppliers of goods have been made co-noticees in the show cause notice for imposition of penalties. In this particular factual matrix the co-noticees become very relevant because they were supposed to have issued the fake invoices which forms the basis of allegations against the appellant. The original authority has dropped the imposition of penalties against the co-noticees which has not been challenged by the department. We find that First Appellate Authority, in the impugned order, has not dealt with any of the issues in detail to show how the adjudicating authority has erred in concluding that there is insufficient evidence to substantiate that the appellant received invoices without the material in question. Apart from a blank statement that the investigating agency had conducted fool proof investigation, the First Appellate Authority has not explained at all as to why the adjudicating authority was wrong in concluding that there is no evidence of non-receipt of goods covered by the invoices in question.

8. We also find great force in the argument of appellant that when they received the 90% of the material from these two suppliers and have manufactured and exported goods, they could not have manufactured and exported the goods without receiving the goods. This is an indirect evidence that the goods must have been received.

9. In conclusion, we find that the department has not been able to establish that the goods covered by the invoices have not been received by the assessee. In view of the above, we find that the First Appellate Authority has erred in setting aside the order of the lower authority. We also find that the show cause notice was based on various statements which were relied upon and the procedure prescribed under Section 9D of Central Excise Act, 1944 was not followed and it also does not appear that the persons whose statements were relied upon were put to cross examination during the adjudicating proceedings. Under these circumstances, the statements cannot be relied upon. In conclusion, we find that the assessee's appeal needs to be allowed and the impugned order needs to be set aside and we do so. The appeal is allowed and the impugned order is set aside.

(Dictated and pronounced in open court)

(P. VENKATA SUBBA RAO)
MEMBER (TECHNICAL)

(RACHNA GUPTA)
MEMBER (JUDICIAL)

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