IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
EAST REGIONAL BENCH : KOLKATA

Appeal Nos. Ex/75863/2017 & Ex/76112/2017, CO-75897&76179/2017

Arising out of Order-in-Appeal Nos. 162-163/KOL-IV/16-17 dated 06.03.2017 passed by the Commissioner of Central Excise (Appeals-II), Kolkata.

Commissioner of Central Excise, Kolkata-IV
...APPELLANT(S)

VERSUS

1. Shri Samir Kumar Gupta
2. Shri Krishna Chandra Bajaj

...RESPONDENT (S)

APPEARANCE
Shri S. Mukhopadhyay, Suptd. (A.R) for the Appellant (s)
Shri N. K. Choudhary, Advocate for Sl. No. 1 & Shri S. P. Siddhanta, Consultant for Sl. No. 2 for the Respondent (s)

CORAM:
SHRI P. K. CHOUDHARY, HON'BLE JUDICIAL MEMBER

DATE OF HEARING:-...06.02.2018

DATR OF PRONOUNCEMENT. 27.03.2018

ORDER N0. FO/A/75781-75782/2018

Per Shri P. K. Choudhary :

The facts of the case in brief are that M/s Jupiter Alloys & Steel (India) Ltd. (the assessee) are engaged in the manufacture of Railway Components Like Bogies, Couplers, classifiable under Chapter 86 of Central Excise Tariff Act, 1985. During investigation, it was found that (i) M/s Indo Thai Flexible Tubes Ltd. during November 2008, issued CENVAT invoices to the assessee. It was found that the vehicle No. as mentioned in the invoices are non-existent vehicles. A show Cause Notice dated 20.11.2013 was issued to the assessee, Shri Samir Kumar Gupta, Director of the assessee, M/s Indo Thai Flexible Tubes Ltd. and Shri Krishna Chandra Bajaj, Broker of Iron & Steel, proposing demand of Central Excise duty and imposition of penalties. By the impugned order the Adjudicating Authority confirmed the demand of Central Excise duty of Rs.12,56,789/- alongwith interest and imposed penalty of equal amount of duty on the assessee. It has appropriated the entire amount of duty alongwith interest as deposited by the assessee. It has further imposed penalty of Rs.12,56,789/- each on the other co-noticees. Shri Samir Kumar Gupta, Director of the assessee and Shri Krishna Chandra Bajaj filed appeals before the Commissioner (Appeals). By the impugned order, the Commissioner (Appeals) set aside the penalties on the respondents herein. Hence, Revenue filed these appeals. The respondents have filed cross-objections.

2. Heard both sides and perused the appeal records.

3. It appears from the record that the assessee during investigation accepted the irregular availment of CENVAT Credit and also paid the entire amount of CENVAT Credit alongwith interest which was duly appropriated by the Adjudicating Authority. It is seen from the adjudication order

that Shri Krishna Chandra Bajaj, (Respondent No. 2) in his statements stated that he received the direction for fake transaction through Mobile phone and landline by the Director of the assessee. The respondent No. 2 admitted that no material was transacted. Only commercial bills/ invoices and challans were raised. It has been observed that the Respondent No. 1, director of the assessee, masterminded behind the entire play having control over the state of affairs of the company.

4. The Commissioner (Appeals) observed that the Show Cause Notice has failed to bring about a clear picture of the role played by the Respondent No. 1. It is also observed that the Respondent No. 2 stated in his written submission before the Adjudicating Authority that he is retracting his statements recorded before the investigating officers. Hence, the Commissioner (Appeals) set aside the penalties on the Respondents as there is no material available of the act of abetting on the part of the Respondents.

5. Revenue in their grounds of appeal stated as under:-

> "(i) That the Commissioner (Appeal-II) failed to consider that Sri Krishna Bajaj had admitted and confirmed that only invoces were issued but no material was transacted in his deposition before the Central

Excise Officers on different dates i.e. on 08.08.13, 13.08.13, 14.08.13 & 16.08.13. Shri Bajaj had not retracted his statement immediately. The retraction came at the time of written submission before the adjudicating authority i.e. on 12.09.2014. So, the Retraction came after almost of one year after the statement recorded. So, the retraction is after thought.

(k) Commissioner (Appeal) failed to consider Krishna Chandra bajaj having crucial role in making paper transaction and he is the abater in issuing invoices by the M/s Inothai Flexible Tubes Ltd. (Unit-II) to M/s Jupiter Alloys & Steel (I) Ltd. without supply of goods to enable M/s Jupiter Alloys & Steel (I) Ltd to avail CENVAT Credit without receipt of input. Thus Sri Samir Gupt, Proprietor of M/s Jupiter Alloys & Steel (I) Ltd. abated in defrauding the CENVAT scheme as well as the Government Revenue.

(l) That the Commissioner (Appeal-II) totally ignored the factual aspect and allowed the appeal merely on assumption and presumption without properly analyzing the irrefutable evidences on record.

(m) That the Commissioner (Appeal-II) did not consider that being the director of the M/s Jupiter Alloys & Steel (I) Ltd. the person concern cannot escape responsibility and having key role in this unlawful scheme of misusing the benefit of CENVAT Credit. The entire activity of the Noticee Company ought to be shouldered by the Director. As a Director of the Noticee No. 1 looking after the entire activities of the company having full control over the day-to-day affairs of the company, for which he will be liable to penalty under Rule 26 (2) of the Central Excise Rules, 2002. That Appellate authority failed to take notice to the fact that Sri Samir Kumar Gupta, Director of M/s Jupiter Alloy and Steel (I) Ltd., had executed and perpetuated this fraud undertaking paper transaction with Sri Krishan Chandra bajaj, Broker of Iron and Steel and M/s Indo Thai Flexible Tubes Ltd. (Unit-II) and deliberate the mis-availment of Cenvat Credit by way of manipulation of their statuary records to fabricate such purchase of inputs and consequent availment of Cenvat Credit on the strength of such Excise Invoices issued by the aforesaid M/s Indo Thai Flexible Tubes Ltd. (Unit-II) and the Commissioner (Appeal) had wrongly waived the penalty imposed on Sri Samir Kumar Gupta."

6. The Ld. Counsel appearing on behalf of the Respondents supported the findings of the Commissioner (Appeals) and cited various case laws. I find that there is no dispute that the assessee availed the irregular CENVAT Credit on the basis of

the fake transactions. The Respondent No.2 in various statements admitted his involvement in the fake transaction of the assessee. The said statements were retracted in reply to Show Cause Notice without assigning any reason and therefore, the retraction of the statements cannot be accepted. The Respondent No. 1 2 also admitted that fake transactions were made under the instruction of the Respondent No. 1. Who has paid the duty alongwith interest on behalf of the assessee. Apparently, it is evident from the records that both the Respondents were involved in the fake transactions. Therefore, the findings of the Commissioner (Appeals) cannot be accepted.

7. The Ld. Counsels cited various case laws which are not applicable to the facts and circumstances of the present case. In those case laws, the department did not bring any material on record for imposition of personal penalties. In the present appeals, it has already been observed that there are materials against the Respondents for involvement in the fake transactions. However, I find that after considering the facts and circumstances of the case in totality, the quantum of penalties imposed on the Respondents are excessive.

8. In the view of the above discussion, the impugned order passed by the Commissioner (Appeals) is set aside. The orders

of the Adjudicating Authority are restored subject to that the penalties imposed on the Respondents are reduced to Rs.2,50,000/- each. The appeals filed by the Revenue are allowed in the above terms.

(Pronounced in the open court on…27.03.2018…)

(P. K. CHOUDHARY)
MEMBER (JUDICIAL)

T.K.