IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH: KOLKATA

Excise Appeal No. 76282/2018

(Arising out of Order-in-Appeal No.33/DGP-C.EX. /2017 dated-21/12/2017 passed by the Commissioner of CGST & Central Excise, Silliguri)

Shri Ashok Kumar Verma

Applicant (s)/Appellant (s)

Versus

Commr. of C. Ex., Durgapur

Respondent (s)

Appearance:

Sri Chanchal Bhattacharyya, Advocate for the Appellant (s)

Shri A.K. Biswas, Supdt. (A.R.) for the Respondent (s)

CORAM:

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

Date of Hearing/Decision :- 17.08.2018

ORDER NO: FO/A/77294/2018

PER SHRI P.K. CHOUDHARY

The facts of the case in brief are that proceedings for demand of recovery of CENVAT Credit was initiated against M/s. East India Holding Pvt. Ltd. , Durgapur (EHPL) on the alleged ground that they have availed CENVAT Credit on the basis of invoices issued by M/s. Industrial Associates. It was also alleged that the transporter had not transported the impugned inputs. The Adjudicating Authority while adjudicating the case of (EHPL), imposed a penalty of Rs.3.00 Lakhs on the appellant. Shri Ashok Kumar Verma, proprietor of M/s. United Transport Construction Co., under Section 11AC of the Central Excise Act, 1944 read with Rule 26 (1) of the Central Excise Rules,2002. On appeal before the lower Appellate Authority, the Ld. Commissioner (Appeals) upheld the order dated 31/05/2017 passed by the Assistant Commissioner and rejected the appeal. Hence the present appeal is before the Tribunal.

2. The Ld. Advocate appearing on behalf of the appellant submits that the issue of transport bill do not help or facilitate the availment of CENVAT Credit in as much as Rule 9 of the CENVAT Credit Rules, 2004 does not include transport bill on the basis of which CENVAT Credit can be taken. It is his submission that CENVAT Credit had been taken on the basis of alleged fake invoices. He further submits that the appellant admittedly did not acquire the possession of the goods nor undertook its transportation or removal of the goods in respect of which CENVAT Credit has been taken. Imposition of penalty under Section 11AC is not applicable as the appellant was not liable to pay Central Excise Duty. Penalty under Rule 26 (1) of Central Excise Rules, 2002 is also not imposable in as much as the ingredients specified in the Rule did not exist. The Ld. Advocate relied upon the decision of the Tribunal in the case of Time & Space Haulers Satish Agarwal Vs. Commr. of Central Excise reported in 2017 (5) TMI 560-CESTAT, Mumbai

3. Ld. D.R. reiterates the order of the Lower Authority.

4. Heard both sides and perused the appeal record. I find that the issues involved in the impugned appeal are as under:

i) Whether, penal provision specified in sub-rule (1) of Rule 26 of the CER, 2002 is applicable in as much as the appellant admittedly did not acquire the possession or transported the impugned goods.

ii) Whether, provision of sub-rule (2) (i) of Rule 26 is attracted in as much as the appellant has not issued excise duty invoices without delivery of the goods.

iii) Whether, “transport bill” is an admissible document on the basis of which CENVAT Credit can be taken in terms of CENVAT Credit Rules.

iv) Whether, by issuing the purported “transport bill”, the appellant has facilitated the user of the document to take alleged CENVAT Credit under Central Excise Rules, 2004.

v) Whether, penal provision of sub-rule (2) (ii)of Rule 26 of the Central Excise Rules, 2002, is imposable in the instant case.

vi) Whether by issuing alleged fake “transport bill”, the appellant has committed offence falling under any Central Excise law warranting imposition of penalty in a case when such act does not facilitate the user to take Cenvat Credit.

5. The appellant namely Shri Ashok Kumar Verma , proprietor of M/s. United Transport and Construction Co. was made a co-noticee and was asked as to why the penalty under 26(1) of the Central Excise Rules, 2002 should not be imposed on him. The Order-in-Original No. 10/AC/CE/ADJN/DGP-II/2017 dated-31/05/2017 was passed in the case of M/s. East India Holding Pvt. Ltd. (EHPL) alleging irregular availing Cenvat Credit on fake invoices and Shri Ashok Kumar Verma proprietor of M/s. United Transport and Construction Company was held liable for penal action since it was held that he abetted in wrong availment of CENVAT Credit by EHPL.

6. I find that the issue is no more res integra in view of the decision of the Tribunal in the case of Time & Space Haulers Satish Agarwal (supra). The relevant paragraphs of the order of the Tribunal are reproduced below:

> “ I have carefully considered the submission made by both the sides.I find that on the appellants, the penalty under Rule 26 was imposed . rule 26 reads as follows:
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> “ Rule 26. Penalty for certain offences:
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> (1) Any person who acquires possession of, or in any way concerned in transporting, removing , depositing, keeping , concealing , selling or purchasing or in any other manner deals with, any excisable goods which he knows or has reason to believe are liable to confiscation under the Act or these rules, shall be liable to a penalty not exceeding the duty on such goods or two thousand rupees, whichever is greater.
>
> (2) Any person, who issues-
>
> (i) An excise duty invoice without delivery of the goods specified therein or abets in making such invoice; or
>
> (ii) Any other document or abets in making such document , on the basis of which the user of said invoice or document is likely to take or has taken any ineligible benefit under the Act or the rules made there under like claiming of CENVAT credit under the CENVAT Credit Rules, 2004 or refund, shall be liable to a penalty not exceeding the amount of such benefit or five thousand rupees, whichever is greater.

5. In the facts of the present case, the charge on the appellants is that they have issued LRs for transportation between ICD Tughlakabad to Nakoda Trading Corporation, Bhiwandi. In my considered view the act of the appellants does not cover under Rule 26 for the reason that the appellants have neither dealt with any goods, which is liable for confiscation. Secondly, the issuance of LRs does not fall under any offence under Central Excise law. The LR is not a duty paying document on the basis of which Cenvat Credit can be claimed. The penalty under Rule 26 was imposed with reference to fraudulent availment of Cenvat Credit by M/s. Rashtriya Metal Industgries Ltd. The LR is only showing the transportation from ICD Tughlakabad to Nakoda Trading Corporation. The issue of fraudulent availment of Cenvat Credit is related to the cenvatable invoice issued by Nakoda Trading Corporation, Bhiwandi to Rashtriya Metal Industries Ltd. Therefore, it cannot be said that even regarding the offence of fraudulent credit, the present appellants are involved.

6. In view of the above facts, I do not find any reason to impose any penalty under Rule 26 on the appellants. Since the factual position of this case itself, penalty is not imposable on the appellants, all the case laws relied upon by the Revenue need not be discussed as the facts in those case is different from the facts of the present case. As per my above discussion, the impugned orders are not sustainable and the same are set aside. The appeals are allowed. "

7. I find that the aforesaid decision of the co-ordinate Bench of the Tribunal is squarely applicable to the facts of the present case. It is my considered view that the appellant by act of issue of purported transport bills has not done any fault under Central Excise Law as well as the transport bill is not a valid duty paying document on the basis of which CENVAT Credit would be claimed.

8. In view of the above discussion, the impugned order cannot be sustained and the same is set aside. The appeal filed by the appellant is allowed with consequential benefit to the appellant.

(Operative part of the order already pronounced in the court)

P.K. CHOUDHARY
(JUDICIAL MEMBER)

k.b/-