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

Excise Appeal Nos. 150-152 of 2010

(Arising out of the Order-in-Original No. 44/Commissioner/09 dated 27.11.2009 passed by Commissioner of Central Excise, Jamshedpue.)

M/s Usha Martin Ltd.,
(Usha Alloys & Steels Division) Phase V, Adityapur Industrial Area,
P.O.-Gamharia 832108, Dist.-Saraikella, Jharkhand.
M/s Jayesh Taunk,

...Appellant (s)

VERSUS

Commissioner of CGST & Central Excise, Jamshedpur.
143, New Baradwari, Ssakchi, Jamshedpur-831001.
. ...**Respondent(s)**

APPERANCE :
Shri Sanjay Dixit, Advocate for the Appellant
Shri S. S. Chattopadhyay, Authorized Representative for the Respondent

CORAM:
HON'BLE MR. R. MURALIDHAR MEMBER (JUDICIAL)
HON'BLE MR. K. ANPAZHAKAN MEMBER (TECHNICAL)

FINAL ORDER No.77298-77300/2023

DATE OF HEARING : 09.10.2023
DATE OF DECISION : 09.10.2023

PER K. ANPAZHAKAN :

Briefly stated facts of the case are that the Appellant (M/s. Usha Martin Ltd.), have their First factory at Gamharia, referred as Usha Alloys Steel Division (UASD), has cleared goods (Steel Billets and Steel Wire Rods) to its Second Factory, referred as Usha Martin Ltd. Straight Bar and Wire Mill Division (UM-SB&WMD) on payment of applicable Central Excise Duty. Proceedings were first initiated against the Appellant's First Factory alleging short payment of Central Excise Duty consequent to under valuation by not observing Rule 8 of the Central Excise Valuation Rules. Show Cause Notice was issued on Appellant's

First Factory for demand of differential excise duty for the period 2003-04 to 2007-08 which was adjudicated vide Order-in-Original No. 36/Commissioner/2009 dated 15thMay, 2009 by the Ld. Commissioner, Central Excise, Jamshedpur.

2. In the course of adjudication of the aforesaid SCN issued on Appellant's First Factory, the differential excise duty was deposited with the Central Excise Department. Simultaneously, the Appellant's First Factory issued supplementary invoices on its Second Factory which received the goods, i.e. UM-SB&WMD (the present Appellant herein) during the period September 2007 to March 2008. The Appellant i.e., the Second factory (UM-SB&WMD) availed Cenvat Credit during the period <u>October 2007 to March 2008</u> on the strength of aforesaid supplementary invoices issued by the First Factory and disclosed the same in the periodical Central Excise Return filed with the Department.

3. The Department issued the impugned SCN dated 18thSeptember, 2008 on the Second Factory, to dispute the availment of credit on the ground that the same was barred under Rule 9(1)(b) of the CENVAT Credit Rules 2004(CCR) . The said SCN was adjudicated vide the impugned Order-in-Original 27th November, 2009 wherein it has been observed by the Ld. Commissioner that the credit has been availed on the strength of the supplementary invoices issued for payment of Central Excise Duty on account of fraud and wilful suppression, which is barred under Rule 9(1)(b) of the Central Credit Rules. Accordingly, equivalent penalty has also been imposed on UM-SB&WMD u/s 11(AC). Further, penalty of Rs.50 lakhs has been imposed on Appellant's First Factory under Rule 26(2)(ii) of the Central Excise Rules and further

penalty of Rs.10 lakhs on Jayesh Taunk Under Rule 26(2)(ii) of the Central Excise Rules. Aggrieved against the impugned order, all the three Appellants have filed the present appeal.

4. In their grounds of appeal, the Appellant submitted that the entire case of the Department is that the differential duty was paid by the First Factory after being pointed by the Central Excise Department. It has also been alleged that the since the demand along with the interest and penalty was confirmed on the First Factory vide OIO No. 36/Commissioner/2009 dated 15thMay, 2009, the availment of credit by the Appellant of the differential duty amount paid by the First Factory is not correct in view of bar prescribed in Rule 9(1)(b) of CCR.

5. In the Appeal bearing No. E-482/2009 filed by Appellant's First Factory against OIO dated 15thMay, 2009 before this Tribunal, it has been held vide Final Order dated 11th July, 2018 that the valuation adopted by the First Factory was legally correct and that there was no short payment of Central Excise Duty. Further, it has been held that since the demand of differential duty, which is legally not payable, has been deposited by the First Factory, which is available at CENVAT Credit in the hands of the receiving units, i.e. the Second Factory (the Appellant herein). Thus, there is a complete case of Revenue Neutral Situation and there could not be any case of fraud or suppression. With the said observation, this Tribunal has set aside the OIO dated 15thMay, 2009 which was passed against Appellant's First Factory (i.e. the transferor unit).

6. Since this Tribunal has categorically held that there was no case of fraud or suppression as wrongly observed by the Ld. Commissioner

while adjudicating the case of Appellant's First Factory, the very basis of denial of credit in the instant case of the Appellant's Second Factory (UM-SB&WMD) by invoking the Rule 9(1)(b) of the CCR is legally not sustainable. Further, this Tribunal has also observed that payment of differential duty by the First Factory is available as CENVAT Credit in the hands of Second factory, the same leads to a Revenue Neutral Situation, in which case there cannot be any scope for making allegation or fraud or suppression with an intent to evade payment of duty.

7. In support of their claim, the Appellant placed their reliance on the decision of this Tribunal in the case of **M/s. Jai Balaji Industries Ltd. vs CCE, Bolpur (Final Order No. 75779 & 75790 of 2023 dated 22^nd June, 2023)** wherein it has been held that in case of Revenue Neutral Situation, there cannot be any imposition of interest and penalty. Since, the availment of credit by the Appellant i.e., UM-SB&WMD is legal and proper, the impugned demand of duty along with interest and penalty is bound to fail. On the same count, the imposition of penalty on UASD (First Factory) and Jayesh Taunk is also liable to set aside.

8. The Ld. A.R. reiterated the findings in the impugned order.

9. We observe that the issue involved in the present appeals is regarding eligibility of Cenvat credit availed on the strength of supplementary invoices issued by the First Factory. The department was of the view that the supplementary invoices were issued after payment of Central Excise Duty arisen on account of fraud and wilful suppression, which is barred under Rule 9(1)(b) of the Central Credit

Rules (CCR). Accordingly, it was proposed to deny the credit to the Second Factory, along with interest and imposition of penalty. However, we find that vide Final Order dated 11th July, 2018, this Tribunal has held that the valuation adopted by the First Factory was legally correct and that there was no short payment of Central Excise Duty. Further, it has been held that since the demand of differential duty, which is legally not payable, has been deposited by the First Factory, which is available as CENVAT Credit in the hands of the receiving units, i.e. the Second Factory (the Appellant herein). Thus, there is a complete case of Revenue Neutral Situation and there could not be any case of fraud or suppression. With the said observation, this Tribunal has set aside the OIO dated 15thMay, 2009 which was passed against Appellant's First Factory. Thus, we observe that after the Tribunal's order mentioned above, there is no bar in availing the credit by the Second Factory which has been categorically allowed in the Tribunal order. Accordingly, we hold that the bar envisaged in Rule 9(1)(b) of CCR is not applicable in this case and the Second Factory has rightly availed the credit based on the supplementary invoices issued by the First Factory.

10. We find that this Tribunal in the case of **M/s. Jai Balaji Industries Ltd. vs CCE, Bolpur (Final Order No. 75779 & 75790 of 2023 dated 22ndJune, 2023)** held that in case of Revenue Neutral Situation, there cannot be any imposition of interest and penalty. In view of the discussion above, the credit availed by the Second Factory has been held to be eligible. Tribunal has categorically held that there was no case of fraud or suppression. As the entire issue was within the knowledge of the department, we hold that no interest is chargeable

and penalty not imposable in this case. Accordingly, we set aside the penalties imposed on the Appellants.

11. In view of the above discussion, we set aside the impugned order and allow all the three appeals filed by the Appellants.

(Dictated and pronounced in the open Court)

Sd/-
(R.Muralidhar)
Member (Judicial)

Sd/-
(K. Anpazhakan)
Member (Technical)

Tushar