

**IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI
COURT No. I**

APPEAL No. E/86386/2017

(Arising out of Order-in-Original No. KLH-EXCUS-000-COM-0038-16-17 dated 24.3.2017 passed by Commissioner of Central Excise & Service Tax, Audit-I, Pune)

Apple Sponge and Power Ltd.

Appellant

Vs.

Commissioner of Service Tax, Audit-I

Respondent

Appearance:

Shri J.N. Tiwari, Advocate, for appellant

Shri H.M. Dixit, Assistant Commissioner (AR), for respondent

CORAM:

Hon'ble Mr. Ramesh Nair, Member (Judicial)

Date of Hearing: 20.4.2018

Date of Decision: 20.4.2018

ORDER No. **A/86094/2018**

This appeal is filed against order-in-original passed by the Commissioner whereby the learned Commissioner imposed a penalty of Rs.4,80,000/- under Rule 26 of the Central Excise Rules on the appellant. The penalty was imposed on the ground that the appellant has received invoices from M/s. Ambe Vaishno Steels Pvt. Ltd. However, they have not received the inputs covered under the invoice. Accordingly, the penalty under Rule 26 was imposed.

2. Shri J.N. Tiwari, learned counsel appearing on behalf of the appellant, submits that Rule 26 penalty is not imposable in the facts of the present case for the reason that it is the case of the department that the appellant has not received the input. Therefore, the appellant has not dealt with the goods. Therefore, penalty under Rule 26(1) is not imposable. As regards Rule 26(2), he submits that penalty under Rule 26(2) is imposable only on the person who issues the invoice on which cenvat credit is passed on. Therefore, sub-rule (2) is also not applicable as the appellant has not issued the invoice whereas they have received the same. He also submits that Rule 26 penalty can be imposed on an individual natural person. It cannot be imposed on the artificial person. He placed reliance on the following judgments:-

(i) *Meenakshi Ferro Ingots Pvt. Ltd. vs. CCE, Pune-III – 2016 (344) ELT 1085 (Tri.-Mumbai)*;

(ii) *Nasik Strips Pvt. Ltd. vs. CCE, Nasik – 2008 (226) ELT 410 (Tri.-Mumbai)*;

(iii) *Homag India Pvt. Ltd. vs. CCE, Bangalore-II – 2017 (357) ELT 1194 (Tri.-Bang.)*.

3. Shri H.M. Dixit, learned Assistant Commissioner (AR) appearing on behalf of the Revenue, reiterates the

finding of the impugned order. He submits that the appellant has abetted duty evasion committed by M/s. Ambe Vaishno Steels Pvt. Ltd. Therefore, they are liable for penalty under Rule 26. He placed reliance on the judgment of the Hon'ble Punjab & Haryana High Court in the case of *Vee Kay Enterprises vs. CCE – 2011 (266) ELT 436 (P&H)*.

4. I have carefully considered the submissions made by both the sides. The limited issue to be decided is in the facts and circumstances of the case, whether the appellant is liable for penalty under Rule 26 which reads as under:-

“Any person who acquires possession of, or is 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 (rupees two thousand) 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).”

On plain reading of Rule 26, it is observed that this penalty can be imposed in two situations. Under sub-rule (1), the penalty is imposable on the person who deals with the goods which is liable for confiscation. In the present case, it is the case of the department that the appellant has not received the input. Therefore, there is no question of dealing with the goods. Accordingly, penalty under sub-rule (1) of Rule 26 is not applicable. As regards sub-rule (2), the said sub-rule is applicable on the person who issues the invoice without supplying the inputs for fraudulent passing on the cenvat credit. Penalty under sub-rule (2) is imposable only on the person who issues the invoice. The appellant does not fall under the category of the person mentioned in sub-rule (2). The invoice was issued by M/s. Ambe Vaishno Steels Pvt. Ltd. Therefore, if at all penalty is imposable, it is on M/s. Ambe Vaishno Steels Pvt. Ltd. and not on the appellant. I also find that penalty under Rule 26 can be imposed only on the natural individual person and not on the artificial person or company because the goods is handled by natural living person and not by an artificial entity. Therefore, on both the counts, penalty under Rule 26 is not imposable.

5. Accordingly, the penalty imposed under Rule 26 on the appellant is set aside. Appeal is allowed.

(Pronounced in court)

(Ramesh Nair)
Member (Judicial)

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