IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, WEST ZONAL BENCH AT MUMBAI

COURT No. I

Appeal No. E/87640, 87642, 87644, 87645/17

(Arising out of Order-in-Appeal No. SK/159-162/Th-II/2017 dated 25.05.2017 passed by Commissioner CGST & Central Excise, Mumbai)

Commissioner of CGST & CE Mumbai **Appellant**

Vs.

Viraj Profiles Ltd. **Respondent**

Appearance:

Shri N.N. Prabhudesai, Supdt. (AR) for appellant
None for respondent

CORAM:

Hon'ble Mr. M.V. Ravindran, Member (Judicial)

Date of Hearing & Decision: 13.03.2018

FINAL ORDER NO. A/86214-86217/2018

Per: M.V. Ravindran

These appeals are directed against orders-in-appeal No. SK/159-162/Th-II/2017 dated 25.05.2017.

2. None appeared for the respondent despite notice. Since the issue lies in a narrow compass, the appeals are taken up for disposal even in the absence of any representative from the respondent.

3. The issue that falls for consideration in these appeals of Revenue, is whether the first appellate authority was correct in

setting aside the penalty imposed by the adjudicating authority on the respondent herein.

4. Revenue authorities issued a show-cause notice to the respondent for demanding and reversal of CENVAT Credit of various input services which were considered as ineligible to be availed. During the course of proceeding, the respondent herein reversed the entire CENVAT Credit on such services along with interest. Adjudicating authority in the adjudication confirmed the demand raised with interest, appropriated the amount and also imposed penalties by invoking provision of Rule 15(2) read with Section 11AC of the Central Excise Act, 1944, as applicable during the relevant period. On an appeal filed by the respondent, the first appellate authority upheld the confirmation of demand along with interest and set aside the penalties imposed. For setting aside the penalties, the first appellate authority has recorded that there is intention to evade duty, as the records of the respondent were audited by the audit party during the relevant period in question i.e. March, 2012 to December, 2012.

5. Learned D.R. would draw my attention to the facts of the case. He would submit that the demands have been raised on the assessee-respondent by invoking extended period which would mean that there was suppression/mis-statement of facts with intention to evade duty. He would submit that the respondent-assessee having discharged the demand raised with

interest has admitted that there was suppression which would mean that the proviso to Section 11A was applicable. He would submit that first appellate authority has erred in setting aside the penalties imposed. He would rely upon the judgement of the Hon'ble Bombay High Court in the case of *Tigrania Metal & Steel Industries P. Ltd. – 2015 (326) ELT 650 (Bom)* for the proposition that even if audit has taken place, it cannot be accepted that the audit party go into each and every records.

6. On careful consideration of the submission made by learned D.R. and on perusal of records, it noticed and undisputed that the respondent-assessee has paid all the demand with interest before the issuance of show-cause notice on being pointed out by Revenue authorities. It is also undisputed that the records of the respondent-assessee's were audited by the audit party regularly during the period in question.

6.1 In my considered view, if the respondent-assessee discharged the demands as pointed out by the authorities during verification of the records with interest, provisions of section 11A(2B) would get attracted and show-cause notice should not have been issued to respondent-assessee. This provision of law was not considered by the adjudicating authority while imposing equal amount of penalty but first appellate authority correctly appreciated the law and set aside the penalty.

6.2 As regards the point raised by learned D.R., I find that the first appellate authority was correct in coming to a conclusion that the records of the respondent-assessee being audited by the authority during the period in question, there cannot be any allegation of suppression of the fact with intention to evade, evenon the discharge of duty liability along with interest. If respondent-assessee would have contested the demand on limitation, he would have succeeded, is my view. I find that similar issue came up before the Hon'ble Karnataka High Court in the case of *CCE Bangalore v. MTR Foods Ltd. – 2012 (282) ELT 196 (Kar.)* wherein Lordships held that the audit party having audited the records of the assessee during period in question, demand by invoking the extended period is unsustainable. I find the first appellate authority was correct in setting aside the penalty imposed and the impugned order does not require any interference. The impugned order is correct, legal and does not suffer from any infirmity.

7. Appeals stand rejected.

(Order dictated in Court)

(M.V. Ravindran)
Member (Judicial)

nsk