IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI
COURT NO.

APPEAL No.E/87206/2018

(Arising out of Order-in-Appeal No.MKK/576/RGD APP/2017-18 dated 27/02/2018 passed by the Commissioner of Central Tax, Central Excise & Service Tax (Appeals), Navi Mumbai)

KKTC Autotech (India) Ltd : **Appellant**

VS

C.C. E & S.T., Raigad : **Respondent**

<u>Appearance</u>

Shri.Rajesh Ostwal, Advocate for Appellant
Shri D.S. Chavan, Supdt. (A.R) for respondent

CORAM:

Hon'ble Shri S K Mohanty, Member (Judicial)

Date of hearing : 04/10/2018
Date of decision : 04/10/2018

ORDER NO. A/87766 / 2018

1. This appeal is directed against impugned order dated 27/02/2018 passed by the Commissioner (Appeals), Central Tax, Central Excise and Service Tax, Raigad.

2. Brief facts of the case are that the appellant is engaged in manufacture of trailers, classified under Tariff Item 87163100 of the First Schedule to the Central Excise Tariff Act, 1985. The appellant commenced its manufacturing activities from 2008 and for that purpose, it was registered with the Central Excise department. The certificate of registration was issued by the department on

27/02/2008. During the period between 01/03/2008 and 03/03/2008, the appellant had cleared the finished product under commercial invoices, without payment of Central Excise duty. Upon scrutiny of the records, the intelligence wing of the department observed such discrepancies. Thereafter, the appellant had deposited the Central Excise duty, attributable to the finished goods removed from the factory during the said period. The department initiated show-cause proceedings against the appellant, seeking for confirmation of duty demand and for imposition of penalty. The matter was adjudicated vide order dated 14/09/2010, wherein Central Excise duty demand of Rs.8,88,272/- along with interest was confirmed on the appellant and equal amount of penalty was imposed under Section 11AC of the Central Excise Act, 1944. The amount towards duty liability already deposited earlier by the appellant was appropriated in the said adjudication order. Learned Commissioner (Appeals) vide impugned order dated 27/02/2018 has upheld the adjudged demand confirmed on the appellant.

3. Learned Advocate appearing for the appellant submits that the appellant is not contested the Central Excise duty and interest demand confirmed in the adjudication order. However, he pleaded that the provisions of Section 11AC of the Act, cannot be invoked for imposition of equal amount of penalty. He submits that non-payment of duty within the stipulated time frame was not owing to the reason of fraud, collusion, suppression of facts, etc., with intent to defraud the Government revenue. To support his stand, the learned Advocate has referred to the statement dated 25/08/2008 recorded by the

department from Shri Suresh Kumar Arora, Managing Director of the appellant company, wherein he had stated that the sale particulars were duly reflected in the commercial invoices issued by the appellant. The learned Advocate also relied on the decision of the Tribunal in the case of *Primier Porcelain Pvt. Ltd., - 2017 (349) ELT 150 (Tri-Del) and Neptune Equipment Pvt. Ltd. – 2013 (291) ELT 385 (Tri-Ahmed),* to state that in absence of clandestine motive in movement of goods without payment of duty, the charges cannot be leveled against the appellant for payment of equal amount of penalty as provided under Section 11AC of the Act.

4. On the other hand, the learned DR appearing for the Revenue reiterates the findings recorded in the impugned order. He also relied on the judgement of the Hon'ble Supreme Court in the case of *UOI Vs. Rajasthan Spinning & Weaving Mills – 2009 (238) ELT 3 (SC) and the decision of this Tribunal in the case of Tanzeem Screenarts – 2006 (106) ELT 209 (Tri-Mum),* to state that imposition of penalty on the appellant under the facts and circumstances of the case is proper and justified.

5. Heard both sides and perused the records.

6. The appellant, in this case, had commenced its manufacturing activities in the month of February 2008 and applied for Central Excise registration before the jurisdictional authorities, which was granted on 27/02/2008. Prior to obtaining the Central Excise registration, the appellant was availing the benefit of SSI Notification No.8/2003 dated

01/03/2003, for clearance of the final products without payment of Central Excise duty. Immediately after obtaining the registration certificate, since the appellant had availed Cenvat Credit of Central Excise duty paid on the inputs, it was not entitled for availment of the benefit of SSI scheme provided under the notification dated 01/03/2003. However, in respect of clearances made on 1st and 3rd March 2008, the appellant did not pay any Central Excise duty on removal of the final products out of its factory premises. Such payment was made on pointing out the mistake by the investigation wing of the Central Excise department. The statement recorded by the department under summon from Shri Suresh Kumar Arora is relevant for consideration of the present dispute. Thus, the said statement is extracted here-in-below:

> *"Q. Whether you agree with the statement given by Shri Sandesh Kadu, Manager (Accounts) of your factory ?*
>
> *Ans. Yes. However, as regards to number of shortages, I am of the opinion that the same should have 10 (ten) which have been correctly recorded in the Panchanama dated 20/08/2008. I am submitting herewith Commercial Invoices bearing Nos.13/01.03.2008 to 22/03.03.2008 (10 in numbers) for these 10 Nos of Trailers. Since we were newly Registered Central Excise Unit, the practice of preparing Commercial Invoice continued and hence we did not raise fresh invoice and hence the lapse occurred. However, the Central Excise duty which remained to be paid have now been reversed on20.08.2008."*

7. On perusal of the above statement and the case records, I find that due to inadvertence, the duty amount was not discharged by the appellant at the time of removal of goods from the factory. However, the appellant had issued commercial invoices, showing the VAT element for sale of final products. Further, I also find that the department had not adduced any substantial evidence to hold that

non-payment of duty by the appellant at the material time was attributable to the reason of fraud, collusion, etc., with intent to evade payment of duty. Hence, in the absence of proper substance of clandestine manufacture and removal, the charges of suppression cannot be leveled against the appellant for imposition of penalty under Section 11AC of the Act. I find that in identical situation, this Tribunal in the case of Premier Porcelain Pvt. Ltd., (supra) and Neptune Equipment Pvt. Ltd., (supra) has set aside the mandatory penalty imposed under Section 11AC of the Act. The judgements relied upon by the learned DR are distinguishable from the facts of the present case, inasmuch as presence of the ingredients mentioned in Section 11AC whether were substantiated by Revenue in those cases were not the subject matter or dispute before the judicial forum.

8. Therefore, I do not find any merits in the impugned order, so far as it imposed penalty on the appellant. Accordingly, after setting aside the impugned order, the appeal is allowed in favour of the appellant to such extent.

(Pronounced and dictated in court)

(S K Mohanty)
Member (Judicial)

PJ