

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

APPEAL NO: E/2016/2010

[Arising out of Order-in-Original No: 67/2010/C dated 21st June 2010
passed by the Commissioner of Central Excise & Customs, Nagpur.]

For approval and signature:

Hon'ble Shri C J Mathew, Member (Technical)
Hon'ble Shri Ajay Sharma, Member (Judicial)

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| 1. Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982? | : | Yes |
| 2. Whether it should be released under Rule 27 of CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not? | : | Yes |
| 3. Whether Their Lordships wish to see the fair copy of the Order? | : | Seen |
| 4. Whether Order is to be circulated to the Departmental authorities? | : | Yes |
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SJS Polymers

... *Appellant*

versus

Commissioner of Central Excise
Nagpur

... *Respondent*

Appearance:

Shri JH Motwani, Advocate for appellant

Shri Ajay Kumar, Additional Commissioner (AR) for respondent

CORAM:

Hon'ble Shri C J Mathew, Member (Technical)
Hon'ble Shri Ajay Sharma, Member (Judicial)

Date of hearing: 27/12/2018
Date of decision: 27/12/2018

ORDER NO: A/88291 / 2018

Per: C J Mathew

Narrating the background leading to this appeal of M/s SJS Polymers, a partnership firm, doing business as 'first stage dealer' of plastic ropes' against the findings in order-in-original no. 67/2010/C dated 21st June 2010 of Commissioner of Central Excise and Customs, Learned Counsel informed that, in the investigation that followed search of the residential premises of an employee of the appellant-firm during which some invoices had been recovered, the officers of Central Excise came to the conclusion that these were fictitious and generated for facilitating the availment of CENVAT credit by the entities therein named without corresponding procurement of goods described therein. The proceedings culminated with imposition of penalty of ₹ 87,08,253/- under rule 26 of Central Excise Rules, 2002.

2. According to Learned Counsel, the entire recovery of duty, and imposition of penalty, was based on erroneous foundation and despite lack of any evidence against the appellant. He contends that of the 703

invoices that were recovered and taken up for investigation, only eight had been certified by the octroi authorities as not pertaining to goods that passed through the respective check point and it was only on this very flimsy evidence that the original authority had held the firm to have been complicit in fictitious availment of CENVAT credit and deserving of penalty of that magnitude.

3. He contends that the lack of the goods that were held liable to confiscation deprived the imposition of penalty under rule 26 of Central Excise Rules, 2002 of legality and propriety. Narrating the provisions of rule 26, which premises that liability to confiscation is a necessary prerequisite, he relies upon the decision of the Tribunal in *Premier Ispat Ltd v. Commissioner of Central Excise, Kanpur* [2018 (360) ELT 109 (Tri-All)], *Sharda Synthetics Limited v. Commissioner of Central Excise, Raigad* [2014 (314) ELT 411 (Tri -Mumbai)] and *Nicholas D'Souza Garage v. Commissioner of Central Excise, Thane* [2015 (320) ELT 579 (Tri. Mumbai)] that found approval of the Hon'ble Supreme Court. A further contention of Learned Counsel was that penalty under rule 26 of Central Excise Rules, 2002 is applicable only to 'persons' which a partnership firm is not. For this restrictive definition, he relies upon the decision of the Tribunal in *Woodmen Industries v. Commissioner of Central Excise, Patna* [2004 (164) ELT 339 (Tri-Kolkata)], which was approved by the Hon'ble Supreme Court, and that of the Tribunal in *RS Jhaveri & Company*

Exports. v. Commissioner of Central Excise, Vadodara [2010 (250) ELT 375 (Tri.Ahmd.)]. He further contends that adjudicating authority has placed reliance on statement recorded on 31st July 2008, but, with subsequent retraction, the want of any further pursuit of the enquiry by the central excise authorities rendered the implicating of the partner of the firm to be dubious in the light of denial by the individual concerned. According to him, this selective reliance on a retracted statement while discarding the denial of the allegation by the partner is opportunistic. He pointed out that, during the pendency, the original authority was made aware that the person whose statement had been recorded was no more, and that, in the absence of negation of the retraction, reliance could not be placed on the contents of such statement. He further contends that the certification obtained from the octroi authorities does not categorically evidence that the records of the relevant years were conclusive enough to arrive at the finding that the goods did not arrive at the destination in the invoices. He places reliance on the decision of the Tribunal in *Liberty Whiteware Ltd v. Commissioner of Central Excise & Service Tax, Jaipur [2017 (358) ELT 422 (Tri-Del)]*, in *Shakshi Makfin Pvt Ltd v. Commissioner of Central Excise, Punchkula [2016 (343) ELT 972 (Tri-Chan.)]* and in *OPG Metals Pvt Ltd v. Commissioner of Central Excise, Tiruchirappalli [2016 (343) ELT 230 (Tri-Chennai)]*. According to him, in identical circumstances, the Tribunal, while deciding upon the

dispute in *Garima Enterprises (P) Ltd v. Commissioner of Central Excise, Delhi-IV*. [2005 (182) ELT 106 (Tri-Del.)], insisted upon the criticality of evidence of non-receipt of materials to warrant action in situations such as this.

4. Learned Authorised Representative, arguing the case of Revenue, informed that proceedings were initiated as the appellant had sold the 'plastic granules' in the local market to users who had no interest in availing CENVAT credit and had furnished false invoices to other manufacturers for credit of duty paid at the time of removal from the factories of manufacture to be utilized without being justly entitled to them. According to him, the onus for disposing the charge of supply of invoices without supply of goods devolved on appellant which they had failed entirely to do. On the submission that the goods would need to be held liable to confiscation before penalty under rule 26 of Central Excise Rules, 2002 could be imposed, he asserts that the deliberate commission of fraud on the part of the appellant could not absolve him from the consequence of penalty by recourse to technical arguments. According to him, the contention of the appellant that they are not 'a person' on whom penalty could be imposed under rule 26 of Central Excise Rules, 2002 runs counter to the definition of 'person' in section 42 of General Clauses Act, and that section 2(31) of Income Tax Act, 1961 also did not offer such restricted interpretation as proposed by Learned Counsel for the appellant.

5. Having heard the rival submissions, we find that there is no record of any investigations having been pursued with the recipients on record to ascertain the receipt of the goods at the destination. We also take note that despite the retraction of the statement of the supervisor that indicted the appellant, the investigation failed to obtain facts that could have corroborated the statement and sustain it even after the person had expired. On the contrary, the appellant had produced statements, as well as extracts from the books maintained by the recipients, before the lower authorities, as evidence of genuineness of the transaction that was alleged to be fiction. We also find that the certification issued by octroi authorities is not only limited to a few of the invoices and that the certification itself lacks sufficient clarity to be treated as a sample validating the allegation against all other invoices.

6. In the above circumstances of lack of acceptable statements or documents, without foraying into the allegation that the goods were not carried to the ultimate destination recorded in the invoices, we propose to deal with the applicability of rule 26 of Central Excise Rules, 2002.

7. It is clear from the rules that confiscability of goods is an essential prerequisite for imposition of penalty. In the instant dispute, there is no allegation that the impugned goods did not come into

possession of the appellant. On the contrary, the entire cases been built around the goods not having passed into the possession of the buyers named in the 703 invoices and, therefore, the goods are not offending even if sold to buyers who are not on record. In the absence of any offence in relation to the goods that are alleged to have been not supplied to persons on record, rule 26 cannot be invoked. On this restriction in and non-applicability of, rule 26 of Central Excise Rules, 2002, the impugned order is liable to be set-aside.

8. It is also abundantly clear from the decision of the Tribunal in *re Woodmen Industries*

'9. The said rule permits imposition of penalty on a person and not on the firm as held in the case of Aditya Steel Industries v. CCE, Hyderabad reported in 1996 (84) ELT 229. There was no confiscation of the goods either. On this score also the penalty on this appellant cannot sustain. We also observe that the Commissioner has referred to the provisions of Income-tax Act regarding issue of cheque for payment in excess of Rs. 25,000/-. If there was any violations of the provisions of the I.T. Act, it was for the Income-tax authorities to have taken objection in that regard. The Central Excise Law does not permit the Commissioner of Central Excise to assume power under the Income-tax Act. There was therefore, no need for the Commissioner to have recorded such a finding when he is discharging the functions of Commissioner of Central Excise. With this observation, we set aside the impugned order and allow the appeal with consequential relief if any.'... .

that partnership firms cannot be proceeded against under rule 26 of Central Excise Rules, 2002 and this having found favour with the Hon'ble Supreme Court by dismissal of the appeal of Revenue, we set aside the impugned order.

9. For the above reasons, we find that the proceedings confirmed against the appellant is contrary to law and set aside the impugned order to allow the appeal.

(Pronounced in Court)

(Ajay Sharma)
Member (Judicial)

(C J Mathew)
Member (Technical)

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