IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, WEST ZONAL BENCH AT MUMBAI
REGIONAL BENCH - COURT NO. 1

Appeal No. E/88203/2018

(Arising out of Order-in-Appeal No. SM/CGST & CX/Bhiwandi/APP-141/17-18 dated 07.05.2018 passed by Commissioner of CGST & Central Excise (Appeals), Mumbai)

Mukesh Sampatraj Jain **Appellant**
Partner, Magma Industries
4,5,101/102/103/106
Neminath Industrial Estate,
Navhar Road, Vasai 401210

Vs.

Commissioner of C.G.ST, Palghar **Respondent**
Null Utpad Shulk Bhawan. 5th Floor, Bandra Kurla complex, Bandra East, Mumbai-400051

Appearance:

Shri Sunil Agrawal, Advocate for appellant
Ms. Anuradha Parab, Authorized Representative for respondent

CORAM:

Hon'ble Mr. S.K. Mohanty, Member (Judicial)

FINAL ORDER NO. **A/85581 / 2019**

Date of Hearing & Decision : 26.03.2019

Per: S.K. MOHANTY

This appeal is directed against the impugned order dated 07.05.2018 passed by the Commissioner of CGST and Central Excise (Appeals), Bhiwandi.

2. Brief facts of the case are that on the basis of anti-evasion case booked by DGCEI, MZU, Mumbai in respect of M/s. Shah Foils Ltd., Gujarat, the department investigated into the matter of availment of wrong Cenvat Credit by M/s. Magma Industries, Vasai (East). It was observed that the said party had availed

Cenvat Credit on the strength of the invoices issued by M/s. Shah Foils Ltd., without receipt and use of the inputs for intended purpose in the factory premises. Accordingly, show cause proceedings were initiated against the M/s. Magma Industries for recovery of wrongly availed Cenvat Credit and for imposition of penalty. Further, show cause proceedings were also initiated against various persons, including the appellant herein for imposition of penalty under Rule 26(1) of the Central Excise Rules, 2002. The matter was adjudicated by order dated 09.12.2016, wherein Cenvat demand was confirmed on Magma Industries along with interest and the amount already deposited by the said party was appropriated in the adjudication order towards the respective confirmed statutory liabilities. The said order also extended the benefit of payment of reduced amount of penalty in terms of clause (e) of sub-section (1) to Section 11 AC of the of the Central Excise Act, 1944. The adjudication order also imposed penalty, amounting to Rs.11,28,706/- on the present appellant. On appeal against the adjudication order dated 09.12.2016, Learned Commissioner (Appeals) has upheld the original order and rejected the appeal filed by the appellant. Feeling aggrieved with the impugned order, the appellant has preferred this appeal before the Tribunal.

3. The Learned Advocate appearing for the appellant submitted that the appellant Shri Mukesh S. Jain is the partner of Magma Industries and since the reduced amount of penalty of Rs.2,82,177/-(being 25% of duty demand of Rs.11,28,706/-) has already been paid by the partnership firm, the benefit of such reduced penalty should be available to the appellant. The Learned Advocate has relied on the decision of this Tribunal in the case of Commissioner of Central Excise, Kanpur Vs. ESS Jay Poly Film (P) Ltd. 2010 (249) E.L.T 575 (Tri.-Del.) to state that

the benefit of reduced amount of penalty of 25% should also be available to the appellant.

4. On the other hand, the Learned AR appearing for the respondent reiterated the findings recorded in the impugned order and further submitted that since the appellant had played active role in fraudulent availment of Cenvat Credit, imposition of equal amount of penalty is justified and in conformity with the statutory provisions. She has relied on the judgment of Hon'ble Supreme Court in the case of Prakash metal Works vs. Collector of C.Ex., Ahmedabad, 2007 (216) E.L.T. 660 (S.C.) and the judgment of the Hon'ble Punjab & Haryana High Court in the case of Kay Iron Works (Jorian) Pvt. Ltd. Vs. Commr. of C.Ex. Delhi-IV, 2018 (359) E.L.T. 110 (P&H) to state that the benefit of reduced amount of penalty should not be available to the appellant.

5. Heard both sides and perused the records.

6. It is an admitted fact on record that without receipt of the subject goods in the factory premises, M/s. Magma Industries had availed fraudulent Cenvat Credit based on the invoices issued by the M/s. Shah Foils Ltd. and that the irregular availed Cenvat Credit was reversed before issuance of show cause notice. M/s. Magma Industries also paid the interest for delayed reversal of Cenvat amount. Accordingly, vide adjudication order dated 09.12.2016, the original authority had extended the benefit of payment of the reduced amount of penalty to M/s. Magma Industries, in terms of clause (e) of sub-section (1) to Section 11 AC of the Central Excise Act, 1944. In this case, the appellant is the partner of M/s. Magma Industries. On perusal of the case records, I find that the appellant had played active role in availment of wrong Cenvat Credit by Magma Industries. Thus,

imposition of penalty under Rule 26 of the rules on him is justified. However, considering the fact that the adjudication order had imposed penalty of 25% of duty on the partnership firm M/s. Magma Industries, I am of the considered view that the benefit of reduced amount of penalty should also be available to the appellant, being the partner of the said partnership firm. I find that on the identical situation this Tribunal in the case of ESS Jay Poly Film (P) Ltd. (supra) has extended the reduced amount of penalty on the Director of the company. The case laws relied on by the Learned AR for Revenue are distinguishable from the facts of the present case inasmuch as payment of reduced amount of penalty by the company/partnership firm was not the subject matter of dispute in those decided cases. Hence, I am of the considered view that in the facts and circumstances of the case, the appellant should be provided with the option to pay reduced amount of penalty.

7. In view of the above discussions, the impugned order is modified to the extent of reducing the quantum of penalty to 25% of the duty amount of Rs.11,28,706/-. Such benefit of payment of reduced penalty should be available to the appellant, if such amount is deposited with the department within 30 days from the date of receipt of this order.

8. The appeal is disposed of in above terms.

(Operative part pronounced in Court)

(S.K. Mohanty)
Member (Judicial)

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