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

APPEAL Nos. E/697,734/2010

(Arising out of Order-in-Original No. 03/BR-03/Th-I/2010 dated 29.01.2010 passed by Commissioner of Central Excise, Thane-I)

Cannon Industries Pvt. Ltd. **Appellants**
Mangaldas K. Patel

Vs.

Commissioner of Central Excise, Thane-I **Respondent**

Appearance:

Shri Alok Yadav, Advocate, for 1st appellant
Shri Ashok Singh, Advocate, for 2nd appellant
Shri Ajay Kumar, Additional Commissioner (AR), for respondent

CORAM:

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

Date of Hearing: 11.12.2018
Date of Decision: 02.04.2019

ORDER No. A/85656-85657/2019

Per: Sanjiv Srivastava

These appeals are filed by the Appellant against the order in original No 03/BR-03/Th-1/2010 date 29.01.2010 imposing a penalty of Rs 1,00,00,000/- (Rupee One Crore) on them under the provisions of Rule 26 of the Central Excise Rules, 2002.

2.1 Muni Group of Companies viz Muni Trade Pvt Ltd, M/s Apex Corporation, M/s Mansa Trader, M/s Globe

Traders and M/s Venkatesh Mercantile Pvt Ltd registered under Rule 12B of Central Excise Rules, 2002 took fraudulent credit to the tune of Rs 11,61,61,197/- (Rupees Eleven Crore Sixty One Lakhs Sixty One Thousand One Hundred and Ninety Seven) on the invoices without receiving the goods.

2.2 They issued ARE-1s and invoices to various merchant exporters or other Rule 12B manufacturers without clearing any corresponding goods.

2.3 This facilitated merchant exporters to claim the rebate of the duty paid as per the said invoices without actually exporting the goods mentioned in the invoice. Merchant exporters never received any goods as stated in the invoice and exported locally procured non duty paid or inferior quality goods.

2.4 Appellant in

i. Appeal No E/697/2010 is amongst a number of Merchant Exporters who had received the invoices and ARE-1 from the Muni Group of companies (in case of appellant from M/s Apex Corporation) and claimed rebate. (Appellant 1)

ii. Appeal No E/734/2010 is a Superintendent Central Excise in-charge of Range –IV of Kalyan –I division having jurisdiction over the area where all the units of Muni Group were located. (Appellant 2)

2.5 After investigations in the matter a show cause notice dated 16th October 2008 was issued to the Muni Group of Companies and others (total 78 noticees) including present appellant. By the said show cause notice while the demands and recovery of the fraudulently availed CENVAT Credit etc., along with interest, confiscation of goods and penalties under relevant provisions of Central Excise Act, 1944 and Central Rules, 2002 was made from the Muni Group of Companies, penalties were proposed against all other noticees (including present Appellant) under Rule 26 and 27 of Central Excise Rules, 2002.

2.6 The said show cause notice has been adjudicated confirming the demands with interest, confiscation of the seized goods and penalties on the Muni Group of Companies. Penalties have been imposed on all other noticees including the present appellants as stated in para 1, supra.

2.7 Aggrieved by the penalty imposed Appellants are in appeal before us.

3.1 In his appeal Appellant 1 has assailed the order of Commissioner stating-

i. The show cause notice has not detailed any allegation against them in specific in as much as no investigation was carried out against them. {Kalyanpur Cements Ltd {2008 (221) ELT 544 (T-Kolkata)]

ii. Cross examination as requested by them has been disallowed.

iii. In the present case Appellant was an merchant exporter and he had received the goods under cover of valid ARE-1 and legible invoice. The goods received were also duly sealed. The relevant ARE-1 were duly certified as correct by the jurisdictional range officer. In view of the above there was no occasion for the appellant to believe that manufacturer supplying the goods had committed some illegality. {Ramesh P Batna [2007 (220) ELT 880 (T-Mum)]}

iv. Appellants have while exporting the goods complied with all the legal formalities and then exported the goods. Custom authorities at the port had duly verified the goods as per law and permitted the export.

v. Since cross examination was essentially required to establish that he had no role to play in the fraud committed by the Muni Group of Companies, such denial results in violation of principle of natural justice as has been held in following decisions-

a. Anil Pannalal Sarogi [2009 (241) ELT 219 (T-MUM)]
b. S Mamasivayam [2009 (240) ELT 255 (T-Chennai)]
c. Patriot Freight Logistics System [2009 (238) ELT 762 (T-Chennai)]
d. P Thiyagrajan [2009 (238) ELT 633 (T-Chennai)]
e. Kartarlal Puranmal Parpiyani [2002 (142) ELT 366 (T-Mum)]
f. Chandan Tubes and Metals Pvt Ltd [2006 (193) ELT 48 (T-Mum)]
g. Sound N Images [2000 (117) ELT 538 (SC)]
h. Shalimar Rubber Industries [2002 (146) ELT 248 (SC)]
i. Merchant Exports (India) Ltd [2001 (128) ELT 428 (T-Del)]
j. Takshila Spinners [2001 (131) ELT 568 (T-Del)]

vi. Since no malafides have been attributed to the appellant, penalty under Rule 26 cannot be justified in view of following decisions-

a. Santosh Textile [2007 (219) ELT 894 (T-Mum)]

b. Promising Exports Ltd [2008 (226) ELT 408 (T-Kol)]

c. Vetri Impex [2004 (172) ELT 347 (T-Chennai)]

d. Perfect Mechanical Industries Ltd [2004 (169) ELT 219 9T-Del)]

vii. It is admitted fact that appellants were not the beneficiary of the fraud committed by the Muni Group of Companies, nor have they connived in commission of the said fraud. Thus in view of decisions as below penalty on them is not justified.

a. Mohibali Roshanaali Naser [1992 (59) ELT 403 (Bom)]

b. Fairdeal Filaments Ltd. [2007 (215) ELT 441 (T-Ahd)]

viii. Out of the total 40 ARE-1, rebate relating to 27 ARE-1 involving amount of Rs 92,71,077/- has already been rejected. Thus there is no loss to revenue from the said 27 transactions. In case of revenue neutrality the penalty cannot be imposed as held in Bhuwalika Pipes Pvt Ltd. [2007 (220) ELT 854 (T-Bang)] and Jay Yuhshin Ltd [2000 (119) ELT 718 (T-LB)].

3.2 In his appeal Appellant 2 has assailed the order of Commissioner stating-

i. The entire proceedings against the him have been initiated based on a single forensic report taken from a private agency. He had requested to bring on record the forensic report taken by Central Bureau of Investigation (CBI). This approach is totally contrary to admitted position on the rebuttal of evidence.

ii. Even in the decisions of quasi judicial authorities, there should be am elementary evidence to arrive at *“pre-ponderance of possibility.”*

iii. Penalty has been imposed on him under Rule 26, without even alleging that he was in any way concerned with transporting, removing, depositing, keeping, concealing, selling or purchasing or in any other manner dealing with excisable goods. The entire case against him that has been made out against him in the order in original is one of dereliction of duty during the material period of time and has nothing to do with dealing in excisable goods, as required for penal consequence under Rule 26. Thus order imposing penalty under Rule 26 is contrary to the provisions of rule itself.

iv. The order is contrary to liberal policy declared by the Government for Textile Sector and hence needs to be set aside.

4.1 We have heard Shri Alok Yadav, Advocate for Appellant 1, Shri Ashok Singh, Advocate for Appellant 2 and Shri Ajay Kumar, Additional Commissioner, Authorized Representative for the revenue.

4.2 Arguing for the Appellant-1 learned Advocate submitted that in the present case penalty has been imposed on their client under Rule 26 while establishing that ingredients as required for imposition of penalty are present in the case against them. They relied upon the decision of Bombay High Court in case M/s Bansal Steel Corporation and Others [Order dated 12th September 2017 in Central Excise Appeal No 108 of 2007]. They stated that Commissioner has in his order imposed penalty on them under Rule 26 of Central Excise Rules, 2002 without establishing that they were ever concerned or have dealt with any of the excisable goods liable for confiscation in the present case. In absence of such a finding the penalty imposed on them under Rule 26 cannot be sustained. He also submitted that by denying the cross examination principles of natural justice too have been violated.

4.3 Advocate appearing for the Appellant-2 submitted that the his client too has been penalized for under Rule 26 of Central Excise Rules, 2002 whereas the entire charge made out against him in the Show Cause Notice and Order in Original is for dereliction of duty and not the one of handling or being concerned with the excisable goods liable for confiscation. He vehemently submitted that there is no evidence to show that his client was part of the conspiracy.

4.4 Arguing for the revenue learned Authorized Representative pointed out the order in original in present case has been passed implicating 78 person including the Muni Group of Companies, their Directors and Constituents. A number of appeals have been filed against the said order in tribunal. Tribunal has by its Final Order No A/3314-3329/15/EB dated 29.09.2015 decided a large bunch of appeals against the said order in original. In his view all the contentions raised by the present appellants have been considered and rejected by the Tribunal in said order. He accordingly submitted that since the issue has already been decided by the tribunal by the said order, the same should be followed in the case of present appellants.

5.1 We have considered the submissions made in appeal and during the course of hearing.

5.2 The issues raised in the present appeals vis a vis imposition of penalty under Rule 26 in the present case were the subject matter of the appeals decided by the tribunal in the order referred to by the learned Authorized Representative. In para 8 rejecting the contentions raised by the Appellants therein which are identical to the contentions raised in the present appeals tribunal has observed as follows:

"8. One of the common contentions by various learned counsels for the appellants was that penalty under Rule 26 cannot be imposed on the appellants, many of them are merchant exporters or Rule 12B manufacturers. It was the contention of the learned counsels that as per the department's case Muni Group of Companies have only supplied duty-paying invoices and the goods have come from some other sources and these goods along with the invoices of the Muni Group of Companies were exported and rebate was claimed. It was the contention of the learned counsels that Commissioner has not indicated as to how and under which provisions of law the goods allegedly procured from the market and exported are liable to confiscation.

8.1 We have given considerable thought to the submission. We reproduce Rule 25 and 26 of the Central Excise Rules, 2002 as under:

> *"RULE 25. Confiscation and penalty. — (1) Subject to the provisions of section 11AC of the Act, if any producer, manufacturer, registered person of a warehouse or a registered dealer, -*
>
> *(a) removes any excisable goods in contravention of any of the provisions of*

these rules or the notifications issued under these rules; or

(b) does not account for any excisable goods produced or manufactured or stored by him; or

(c) engages in the manufacture, production or storage of any excisable goods without having applied for the registration certificate required under section 6 of the Act; or

(d) contravenes any of the provisions of these rules or the notifications issued under these rules with intent to evade payment of duty,

then, all such goods shall be liable to confiscation and the producer or manufacturer or registered person of the warehouse or a registered dealer, as the case may be, shall be liable to a penalty not exceeding the duty on the excisable goods in respect of which any contravention of the nature referred to in clause (a) or clause (b) or clause (c) or clause (d) has been committed, or [rupees two thousand], whichever is greater.

(2) An order under sub-rule (1) shall be issued by the Central Excise Officer, following the principles of natural justice.

RULE 26. Penalty for certain offences. — 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 two thousand rupees, whichever is greater."*

8.2 In the present case, there is no doubt or confusion that penalties have been imposed under Rule 26 ibid. Rule 26 as reproduced above would indicate that ***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 penalty. There is no doubt that the so called merchant exporters or Rule 12B manufacturers have dealt with the goods inasmuch as they purchased the goods from market and in order to claim the rebate/or avail CENVAT credit they approached Muni Group of Companies and purchased certain invoices from them so as to fraudulently show as if the goods were purchased from Muni Group of Companies on the invoices of Muni Group and thereafter exported or used in processing. Thus, there are excisable goods which are purported to be cleared on the invoice of Muni Group. In all cases, the investigations have indicated that the goods were never transported from Muni Group of Companies to the appellants or to the port of export. Investigations revealed that the goods were lifted from some dealers in Surat, etc. Further, investigations indicate that some payments were made to Muni Group of Companies through account payee cheques. However, immediately, thereafter, Muni Group of Companies have issued cheques in the name of some other entities. These cheques were, in turn got discounted by the merchant exporter/appellants. In some cases, the amounts were paid by crossed bearer cheques to Muni Group of Companies. However, these cheques were, in reality, not deposited in the accounts of Muni Group of Companies, but were deposited either in the name of certain dealers or got discounted from various bill* *discounters/shroffs. In nutshell, the money which was purported to have been paid to Muni Group of Companies for purchase of material was not paid to them but either was taken back by the appellants-merchant exporters, or in some cases, some amount was paid to certain dealers in fabric. (Perhaps, some fabrics might have been purchased from them.) Thus, it is evident that the invoices of Muni Group of Companies and the goods purported to be covered by such invoices were dealt by the merchant exporter-appellants. There can be no doubt, that these goods are liable to confiscation under Rule 25(1)(d) of the Central Excise Act, 1994. In view of the above said position, there can be no doubt that penalty is imposable under Rule 26 on the merchant exporter/manufacturer under Rule 12B.*

8.3 We also like to add the very fact that the appellants have procured invoices from a source other than the actual manufacturers of the goods would indicate that these goods were in reality not duty-paid goods. If these goods were duty-paid then there was no reason for the appellants-merchant exporters/manufacturers under Rule 12B to undertake the above mentioned fraudulent activity of approaching Muni Group of Companies and getting the invoices from them so as to create a fraudulent cover that the goods are duty-paid and are manufactured by Muni Group of Companies. In fact, the whole purpose of this exercise was to finally encash duty purported to have been paid (which in reality was never paid to the Government) on the goods through the invoices of Muni Group of Companies and share such booty between Muni Group of Companies and the appellants. In our considered view, there can be no doubt that penalty under Rule 26 is imposable in the facts of the case.

8.4 Even in respect of Rule 12B manufacturers, they have procured the invoices from Muni Group of Companies and the goods from some other source. Here again, goods procured from some other sources would be non-duty paid goods otherwise, there was no need for them to get the invoices from

Muni Group of Companies. The findings recorded above in respect of merchant exporters equally be applicable in the case of Rule 12B manufacturers and, therefore, penalty is imposable. Thus, these are the cases of fraud wherein the appellants as also Muni Group of Companies were equally involved and would be equally benefitted by getting the money from the government exchequer, in the name of rebate even though in reality, no duty was paid in the scheme of the above fraud, it was fraudulently shown that the duty was paid and the appellants or Muni of Group of Companies would be able to get refund of the duty in the form of rebate which thereafter will be distributed among themselves.

8.5 The reasoning adopted by the hon'ble Gujarat High Court in the case of Sanjay Vimalbhai Deora (supra) which in turn has been upheld by the hon'ble Supreme Court is equally applicable. Similarly, the judgment of the Punjab and Haryana High Court in the case of Veekay Enterprises and M S Metals (supra) are equally applicable.

8.6 The learned counsel for the appellant has also submitted certain judgments wherein hon'ble Supreme Court and other courts have held that the goods purchased from the market are deemed to be duty-paid. We have gone through the said judgments. We find the facts in the present case are very different. In fact, if the goods were duty paid, there was no reason for the appellants to approach Muni Group of Companies and procure the fraudulent invoices. In that situation, the appellants could have got the invoices from the seller of the goods and could have claimed the rebate. The very fact that this fraudulent exercise has been done indicates that the goods which were exported and procured from the market were non-duty paid goods. In case of some appellants, the goods were produced in their own unit and if in their own unit they would have paid duty, there was no reason for them to procure the invoices from Muni Group of Companies.

8.7 Various counsels have submitted that Rule 26 was *amended w.e.f. 01/03/2007 wherein dealers were also become liable to penalty and thus, prior to 01/03/2007 no penalty could have been imposed on the dealers. We have considered this submission. While Rule 26(2) is prospective in nature, we find that in this case almost all appellants are Rule 12B manufacturers or merchant exporters. In the case of 12B manufacturers even though they may not have the manufacturing facility themselves, but they were treated as manufacturer under the Central Excise law and hence penalty under Rule 26 as it was existing prior to 01/03/2007 can be imposed. Even in respect of merchant exporter they were not the dealer in the normal sense i.e., who were passing on the CENVAT credit along with the invoices. In fact all such dealers are required to get themselves registered with the excise department and thereafter only they could issue cenvatable invoices. The merchant exporter were not that type of registered dealer with the excise department but they were the person who were party to the fraudulent claim of rebate with the connivance of the Muni Group of Companies either claiming the rebate in their name or giving the right to claim rebate to Muni Group of Companies. Hence the position is different and the penalty under old Rule 26 can be imposed on them.*

8.8 Some of the learned counsels have submitted about the one adjudication order passed by the Commissioner, Mumbai wherein he has taken a view that penalty under Rule 26 cannot be imposed. In our view this is not the correct position in law as there are goods which are purported to covered by certain invoices. One has to deal with such invoices along with the goods and a holistic view of the two has to be taken. One cannot segregate invoices from the goods for the simple reason that both are submitted together for excise purpose. The interpretation taken by the Commissioner is therefore as per his understanding of the law and we do not agree with such an understanding. Such an interpretation of law will make minor violators of the procedure as liable to penalty under Rule 26 while the outright law violators or fraudsters *will go scot free. We therefore take no cognizance of the order passed by the Commissioner and the fact that such order has been accepted by the department is of no consequence."*

Thereafter bench analyzed the role of individual appellant and recorded finding in respect of each appellant separately.

5.3 The allegations in the Show Cause Notice against the Appellants in present case are recorded in para 79 and 80 of the Show Cause Notice as follows:

"79. The merchant exporters involved in the case have knowingly purchased bogus Application for Removals for Exports (ARE-1s), from Muni Group, showing units of Muni Group, as the supporting manufacturer and these respecti8ve Merchant Exporters, as exporters, with an intention to claim and collect the Central Excise Duty shown in the respective ARE1s, just by presenting these ARE1s to the Customs authorities at the time of export at the port of export, along with the non-duty paid and bought out textile fabrics, procured by the Merchant Exporters from the open market, locally. The submission of the Merchant Exporters that they have received the goods mentioned in the respective ARE1s and Excise invoices, of Muni Group, is totally false and baseless due to following observations –

a) The supplier units, their owners on record, have all been found fake, bogus and non existent. Thus the units of Muni Group had availed CENVAT credit on the strength of bogus CENVAT invoices, wherein the goods mentioned in the said CENVAT invoices have never existed and never received. Such bogus CENVAT credit has been used by units of Muni Group, for issuing bogus ARE1s. Therefore when there is no existence of the fabrics mentioned in the ARE1s, the question of exporters obtaining these fabrics, as stated by the exporters in their statements, is totally false and baseless.

b) Receiving goods for export at Surat, or at any other places other than Nhava Sheva/Mumbai Port from units of Muni Group situated in Bhiwandi Taluka of Thane Dist was not economically feasible, as the goods were to be exported from Nhava Sheva/Mumbai ports. Further, none of the Merchant Exporters could produce transport documents for movement of goods from Bhiwandi, Dist. Thane, to Surat, or their respective places. Four of the exporters have produced LR's claiming it to be the transport document for such movement. However on verification this transporter viz. M/s. Chetak Roadlines has been found bogus as at the address given on the LR, there is no such office. The exporters also could not furnish details of whereabouts of such transporter nor did produce the transporter to establish movement of goods from Bhiwandi to Surat and other places.

(b)(i) This indicates that no goods were ever received by them from the premises of units of Muni Group, Bhiwandi.

(b)(ii) On the other hand from the submissions of the CHA's, who dealt with the export consignments, the transporters have been identified in many cases, who in turn identified the places from where the goods for export were lifted while taking them to the port. These premises identified by the transporters in their statements clearly show that those were not the godowns for storing as claimed by the exporters but were processing houses owned by the exporters, cut-pack houses, owned by exporters themselves and generally storing places within city limits of Surat. This indicates that the goods locally procured by the exporters were presented at Customs with the export documents obtained from the units of Muni Group, with an intent to fraudulently avail the rebate of duty shown as paid in the documents of Muni Group, in conspiracy with Shri K.K. Gupta and his Muni Group.

c) Though the exporters have made an attempt to show that the transactions were genuine by issuing cheques in the name of units of Muni Group, for the purported purchase of fabrics, the flow of the amounts shown in such cheques back to the *exporters discussed in earlier paras above indicates that no payments have been made to Muni Group for claimed purchase of fabrics. This pattern of financial flow indicates the very bogus/fake nature of the entire transaction. In fact in this way the Merchant Exporters would get the amount back in cash.*

d) None of the Merchant Exporters or their representatives have stated to have visited the premises of units of Muni Group.

e) The exporters, whose statements were recorded, have stated to have purportedly carried out the textile purchases through brokers, many of which were contacted by them on mobile and no addresses of these brokers were available with the exporters, indicating that these brokers named by the respective exporters are nothing but fictitious persons. In cases where the brokers could be traced by the investigation, they have refused point blank that they had arranged delivery of the goods originating from units of Muni Group at Bhiwandi at the exporters premises and have stated that they had merely brought two parties in contact and the transactions were finalized and carried out by them individually. The contradiction shows that in none of the cases, the goods had originated from the units of Muni Group and the exporters and their claimed brokers had known that the goods being exported by them are not covered by the documents being used by them for export. In fact, the evidence shows that the brokers were merely the persons who arranged the export documents issued by the units of Muni Group, for exporters on payment of some commission charges for such supply of documents.

f) The Superintendent, in charge of the jurisdiction where Shri K.K. Gupta had obtained the registrations for the units of Muni Group, during examination has clearly admitted that in respect of M/s. Apex Corporation, in the quarter ending December-03, he has issued duty payment certificates for the clearances shown in the quarterly return of the period, in *excess of the debits shown therein. His examination has also shown that he was engaged in certifying irregularities of units of Muni group by misusing official machinery and capacity to project the transactions of the units to be genuine. The irregularities were in the form of report towards existence of premises and factory building, issuing unwarranted duty payment certificates, to unauthorized persons, issuing duty payment certificates in excess of debits shown in returns, abetting in forgery of signatures of Inspector posted in his range, denying his own signatures on the host of ARE1s which were opined by the experts to be his signatures only, probably after realizing the repercussions of misdeeds etc. Thus, the very basis on which the exports of the goods has been claimed by the exporters that the goods were cleared on payment of duty by the units of Muni Group supported by the certificate of jurisdictional Superintendent is proven as wrong and false. As such the entire claim that the goods were received by the exporters of Muni Group is also wrong and false.*

g) In spite of repeated requests and recording of statement under Section 14 of the Central Excise Act, 1944 and even arrest under Section 13 of the Central Excise Act, 1944, Shri K.K. Gupta could not produce any of the records required to be maintained by the assesses under the pretext that the same were handled by one Shri Ashok Sawant, his employee. He also did not produce said Shri Ashok Sawant nor did furnish his address or whereabouts. The investigation, when traced out his residence, searched it and pursued for his appearance, Shri Ashok Sawant did not appear or could be traced out, no records were found at his residence, or the residence of Shri K.K. Gupta or even the office at 111, Champaklal Industrial Estate, Sion shown by them on the registration. The entire proceedings indicate that no records were maintained in the manner prescribed under the central excise act, 1944 and merely documents suitable to the exporters and the persons interested in availing fraudulent Cenvat credit were created and apparently sold at *commission to facilitate the purchasers of the documents to earn undue benefits.*

80. From the foregoing paras, it is conclusively established that a conspiracy was hatched by Shri K.K. Gupta, in conjunction with Shri M.K. Patel, the Superintendent, in charge of the Range, the so called manufacturers at Surat who supplied input invoices to him, the exporters at Surat to whom he supplied ARE1s and Central Excise invoices, the so called manufacturers to whom he supplied central excise invoices for availing Cenvat credit, without actually supplying any goods, showing therein duty payment, which was either not done or done from the fraudulent Cenvat credit availed on invoices obtained (from the so called manufacturers of Surat), where with the sole intent to fraudulently avail rebate of duty amount shown on Central Excise documents (invoices/ARE1s), the documents were generated without actually manufacturing or clearing any excisable goods under such documents, by presenting and exporting from the Docks other excisable goods along with these documents so as to make the authorities to believe that the said other goods had duly been cleared on payment of duty under the documents presented before Customs and Rebate/Refund sanctioning authorities."

5.4 Commissioner has in para 93(i) of his order discussed the role of Appellant 1 as follows:

"i) M/s. Cannon Industries have without substantiating the claim have stated that 'all' firms are in existence, overlooking the fact that the registrations were issued to the firms in terms of erstwhile Rule 12B of Central Excise Rules, 2002, but owing to their fraudulent operations they are declared fake. They have also overlooked all the copies of relied upon document including panchnama and statements, which establish wrongness of the transactions with Muni group. Further, whether the rebate benefits were taken by them or Muni group and whether duty components was paid by them or not the transactions when established as fraudulent,

render them penalty. In their final reply while clarifying they have claimed that representative of Apex had approached them delivered the goods at Delhi, which were exported by them from Delhi and payments were made by them. In this regard first of all the reply has projected a lot of false positions. Firstly, they have not specified the representative of Muni group. Secondly they have given address of Apex as Texila Society, Prabhadevi, Dadar, which itself is wrong. Since, this address was occupied by Shri Gupta. Secondly, contrary to specific allegation, which is supported by records, Cannon Ind. have not appeared before the investigation (para 78 B(6) of SCN. In fact they have made correspondence with investigation for seeking time etc. and yet now claim that without their examination charges are made. It is therefore clear that their submission cannot be given any credence and their transactions with Muni group are only on appear without receipt of any goods from Muni group. The rebate claims, therefore, pending sanction, related to them also not be allowed/admissible."

5.5 Commissioner has in para 95 of his order discussed the role of Appellant 2 stating as follows:

"Further, it is clear from the evidence on records that, Shri M.K. Patel, who was Superintendent in charge of the Range-IV, Kalyan-I Division in the jurisdiction of which the units of Muni Group had obtained central excise registration for manufacturing and trading, misstating the facts about activity to be carried out there had actively participated in the entire scheme of fraudulently availing rebates, by using the ARE1s and invoices issued by units of Muni Group. The scheme could succeed only because of his active participation in which he attempted legalizing the documents so issued by Muni Group and authenticating the duty payment shown by the units, by misusing his official position and government machinery. He, while verifying and certifying post verification of premises of M/s. Muni Trade Pvt Ltd, misstated in the report the position of the registered premises in such a way as

if to indicate that the factory actually existed when there was no such facility there, wording it as 'Premises – Exists, Factory Building – Exists'. After reply from Muni Group now, in which they have conceded that there were no activities at their premises and even clearances were made directly from job worker, Shri Patel's submission before investigation that he had verified their premises and had found some goods etc. is also proven wrong, additionally. He has also, certified the post registration verification of M/s. Muni Trade Pvt Ltd, w.e.f. 26.03.04, when the premises was taken on lease from 01.04.04, thus ignoring that when registration was taken even the premises was not taken on rent. He has also, certified the duty payment shown by M/s. Apex Corporation, for quarter ending Dec, 03 in excess of the credit availed and duty debited in the return, which was received by him. The duty debit for the month November, 03 was Rs.32,44,339, where as he issued duty payment certificates in excess to the tune of Rs.6,99,840/-, as admitted by him in his statement. He has also, overlooked the large scale operation shown by the units of Muni Group in their ARE1s and invoices, which were submitted to the Range Office, under Self removal procedure scheme, after clearance and did not undertake any, verification of input credit or other enquiry. In fact in the report on Cenvat credit availed and utilized, submitted to the division, he deliberately omitted to report the figures pertaining to Muni Group, to avoid disclosure of heavy transactions to division. Further during investigation, when confronted with a number of ARE1s bearing stamp of M.K. Patel, Superintendent and his signature, he generally denied the signatures to be his signatures, for ARE1s/Duty payment certificates pertaining to the period after December-03 due to the apprehension that such large scale signing without raising any suspicion to an officer, as senior/experienced as him, should indicate is involvement. However, on verification of the signatures, handwriting expert opined that the signature in respect of five questioned ARE1s and its connected duty payment certificates were of Shri Patel only, thus falsifying *the claim of Shri Patel. Since the five ARE1s were merely taken as representative specimen, at random, one each for one unit of Muni Group, it can be generalized that all the ARE1s on which he had denied signatures were his signatures only. Circumstantial evidences also confirm this finding. That is, when confronted with a few ARE1s, he denied them to be bearing his signatures, however, on these very ARE1s, he had put a new confirmatory signature, by visiting the Range Office after transfer to confirm that those were his signatures only. The contradictory statements indicate that he was lying about it and all the ARE1s were signed by him. By these acts of commission/omission supported by evidences in the form of ARE1s, duty payment certificates bearing his signature, the impugned Return of M/s. Apex Corporation viz-a-viz duty payments certificates issued in excess of duty shown in the Returns, Shri M.K. Patel is liable to penalty under Rule 26 ibid."*

5.6 **Appeal No E/697/2010:**

i. From the facts as state above in para 5.4 that facts leading to imposition of penalty on the Appellant 1 were considered by the Tribunal while considering the appeals No E/879, 910, 929, 1621/2010. Since tribunal has dismissed the appeals filed in those case.

ii. In our view the appellant has exported the goods based upon the invoices and ARE-1 of M/s Apex Corporation (one of the Companies in Muni Group of Companies) while the goods were procured from different sources and claimed rebate on the basis of such fraudulent documents. Claim of the Appellant-1 that he was not the beneficiary of such rebate claims do not appeal, because the claim of rebate was filed on the basis of export made by them. Further the claim that in respect of 27 ARE-1 out of 40 ARE-1 against which they had exported the goods the rebate claim of Rs 92,71,077/- has been rejected is in manner admission of fact that the exports were made by them fraudulently against the documents issued by the Muni Group of Company. We do not find any merits in the submission of the Appellant -1 to the effect that the since refund claims have been rejected there is no loss of revenue and has case against them is revenue neutral. In fact but for the investigations undertaken the rebate claims would have been allowed in the favour of claimant.

iii. We also do not find any merits in the submission of the appellant that the case was decided against them by the Commissioner in violation of principle of natural justice, as they were not allowed cross examination of certain officers and co-noticees. It is settled law that adjudicating authority is bound to consider the request for cross examination and in case he finds that the cross examination is not warranted in the facts of particular case he can reject the same by assigning the reasons for same.

iv. In case of Surjit Singh Chabbra [1997 (89) ELT 646 (SC)], Apex Court has held that:

"2. *It is contended by learned counsel for the petitioner that the petitioner is entitled to cross-examine the Panch witnesses and the Seizing Officer for the goods seized in contravention of the FERA & Customs Duty Act and that the opportunity has not been given. Therefore, it is violative of natural justice.*

3. *It is true that the petitioner had confessed that he purchased the gold and had brought it. He admitted that he purchased the gold and converted it as a Kara. In this situation, bringing the gold without permission of the authority is in contravention of the Customs Duty Act and also FERA. When the petitioner seeks for cross-examination of the witnesses who have said that the recovery was made from the petitioner, necessarily an opportunity requires to be given for the cross-examination of the witnesses as regards the place at which recovery was made. Since the dispute concerns the confiscation of the jewellery, whether at conveyor belt or at the green channel, perhaps the witnesses were required to be called. But in view of confession made by him, it binds him and, therefore, in the facts and circumstances of this case the failure to give him the opportunity to cross-examine the witnesses is not violative of principle of natural justice. It is contended that the petitioner had retracted within six days from the confession. Therefore, he is entitled to cross-examine the panch witnesses before the authority takes a decision on proof of the offence. We find no force in this contention. The Customs officials are not police officers. The confession, though retracted, is an admission and binds the petitioner. So* *there is no need to call Panch witnesses for examination and cross-examination by the petitioner."*

v. In case of Naresh J Sukhwani [1997 (83) ELT 258 (SC)]], Apex Court has held that-

3. *The Joint Secretary to the Government, the revisional authority, has held that the evidence and the statement given by Mr. Dudani incriminates the petitioner. This was established with reference to the photographs and other intrinsic material. On that basis, he concluded that Mr. Dudani incriminated himself and the appellant in passing off foreign currency out of India, i.e., to Hong Kong. It was accordingly held that the contravention was established. It is contended that the statement of co-accused could be used only to corroborate other evidence as one of the circumstances under Section 30 of the Evidence Act. But it cannot be used as substantive evidence without corroboration from other independent evidence. Except the statement of Dudani, there is no other independent evidence. Mr. Dudani's evidence cannot be pressed into service to arrive at the conclusion that the petitioner is involved in the passing off foreign currency out of India.*

4. *It must be remembered that the statement made before the Customs officials is not a statement recorded under Section 161 of the Criminal Procedure Code, 1973. Therefore it is a material piece of evidence collected by Customs officials under Section 108 of the Customs Act. That material incriminates the petitioner inculpating him in the contravention of the provisions of the Customs Act. The material can certainly be used to connect the petitioner in the contravention inasmuch as Mr. Dudani's statement clearly inculpates not only himself but also the petitioner. It can, therefore, be used as substantive evidence connecting the petitioner with the contravention* *by exporting foreign currency out of India. Therefore we do not think that there is any illegality in the order of confiscation of foreign currency and imposition of penalty. There is no ground warranting reduction of fine.*

v. Thus we do not find any merits in the submissions of the appellants that his request for cross examination was turned down by the Commissioner in violation of principles of natural justice.

vi. Appeal No E/929/2010 considered by the Tribunal in its order 29.09.2015 was filed by one Shri Shyam Sunder A Shrama, proprietor of M/s Riddhi Siddhi International, M/s Shree Laxmi Impex and M/s Surya Exports. The case of revenue against the said appellant was on all four identical to the case of Appellant-1 and the quantum of penalty imposed on him was same as that imposed on present appellant. Tribunal has after consideration of all the issues dismissed the appeal in that case. Following the said order of tribunal and taking note of the fact that by their acts appellant has/ was in process of facilitating the fraudulent rebate in excess of Rs 1,00,00,000/- we uphold the order of Commissioner against Appelant-1 and dismiss his appeal.

5.7 **Appeal No E/734/2010.**

i. Role of the Appellant and findings of the Commissioner against him has been stated in para 5.5 above.

ii. In para 97, Commissioner has again observed that role of the Appellant 2 was not limited but he was roped in as part of the conspiracy conceived and hatched by the Shri K K Gupta. He while performing his duties had certified duty payments without verification and issued positive reports of CENVAT credit whenever referred by other jurisdictions.

iii. Thus Appellant -2 has knowingly or unknowingly became party to the conspiracy and fraud committed by Shri K K Gupta and his Muni Group of Companies. Accordingly we have no hesitation in holding that penalty under Rule 26 of Central Excise Rules, 2002 is justified.

iv. Commissioner has imposed a penalty of Rs 1,00,00,000/- on Appellant-2, who is Group B Central Government Employee. The penalty imposed is his highly disproportionate to the means of the person on whom it has been imposed, might be equivalent to all his life earnings. In our view taking into account all the facts and the fact that Appellant-2 could have been the innocent victim of the conspiracy of Shri K K Gupta, we are of the view that ends of justice will be met if penalty amount on Appellant-2 is reduced to Rs 10,00,000/-.

6.1 Thus in view of discussions as above, Appeal No E/697/2010 is dismissed and Appeal No E/734/2010 is partially allowed and penalty imposed on Appellant-2 is reduced to Rs 10,00,000/-.

(Pronounced in court on 02.04.2019)

(S.K. Mohanty)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)

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