CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI
REGIONAL BENCH

Excise Appeal No. 534 of 2007

(Arising out of Order-in-Original No. 16/2006/C dated 29.12.2006/05.01.2007 passed by the Commissioner of Central Excise, Nagpur)

Shri Ramesh Deshpande **Appellant**
Authorised Signatory & Sr. Manager (Excise),
M/s. Indorama Synthetics (I) Ltd.,
A-31, MIDC Industrial Area,
Butibori, Nagpur 441 122.

Vs.

Commissioner of Central Excise, Nagpur **Respondent**
Telangkhedi Road, Civil Lines,
Post Box No.81, Nagpur 440 001.

WITH

Excise Appeal No. 535 of 2007

(Arising out of Order-in-Original No. 16/2006/C dated 29.12.2006/05.01.2007 passed by the Commissioner of Central Excise, Nagpur)

Shri Debdutta Chatterjee **Appellant**
Deputy General Manager (Finance),
M/s. Indorama Synthetics (I) Ltd.,
A-31, MIDC Industrial Area,
Butibori, Nagpur 441 122.

Vs.

Commissioner of Central Excise, Nagpur **Respondent**
Telangkhedi Road, Civil Lines,
Post Box No.81, Nagpur 440 001.

Appearance:

Ms. Payal Nahar, Advocate, for the Appellant
Shri R.K. Dwivedi, Additional Commissioner, Authorised Representative for the Respondent

CORAM:

HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)
HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

FINAL ORDER NO. A/**86667-86668/2021**

Date of Hearing: 27.07.2021
Date of Decision: 27.07.2021

PER: SANJIV SRIVASTAVA

These appeals are directed against order in original No 16/2006/C dated 29.12.2006/05.01.2007 of the Commissioner Central Excise, Nagpur. By the impugned order, the Commissioner has held as follows:

"62. Accordingly I pass the following order

(a) deny the benefit of Notification No. 29/2004 dt 9/7/2004 as amended & order to pay full rate of duty @ 16% on the value of the DTY cleared by Noticees i.e. M/s. Indo Rama Synthetics (I) Ltd., including its DTY Section during the period 1/7/2005 to 28/2/20006.

(b) confirm the demand of Central Excise duty of Rs. 12,58,50,633 (Rupees Twelve Crore Fifty Eight Lakhs Fifty Thousand Six Hundred Thirty Three Only) and Education Cess of Rs. 24,61,512/- (Rupees Twenty Four Lakhs Sixty One Thousand Five Hundred Twelve Only) (total duty of Rs. 12,83,12,145) under Section 11A of Central excise Act, 1944 as raised in Show Cause Notice dtd. 30.05.2006.

(c) I also order recovery of the interest at the appropriate rate under the provisions of Section 11AB of Central excise Act, 1944 from Noticee unit.

(d) I impose penalty of Rs. 12,58,50,633/-. (Rupees Twelve Crore Fifty Eight Lakhs Fifty Thousand Six Hundred Thirty Three Only) under Section 11AC of Central Excise Act, 1944 & Penalty of Rs. 10,00,000/- (Rupees Ten Lakhs Only), under Rule 25 of Central Excise Rules 2002

(e) I impose penalty of Rs. 1,00,000/- (Rupees One Lakhs Only) on Shri Debdutta Chatterjee, Deputy General Manager (Finance) of M/s Indo Rama Synthetics (1) Ltd under Rule 26 of Central Excise Rules, 2002 for his active role, decision making, and participation in the contraventions made by M/s Indo Rama Synthetics (1) Ltd; Butibori for above case of duty evasion and concerning himself with the goods which he believe to be liable for confiscation as discussed in preceding paras.

(f) I impose penalty of Rs.1,00,000/- (Rupees One Lakhs Only) on Shri Ramesh Deshpande, Authorised Signatory and Manager (Excise) of M/s Indo Rama Synthetics (1) Ltd under

Rule 26 of Central Excise Rules, 2002 for his active role, decision making, and participation in the contraventions made by M/s Indo Rama Synthetics (1) Ltd; Butibori for above case of duty evasion and concerning himself with the goods which he believe to be liable for confiscation as discussed in preceding paras."

2.1 We have heard Ms Payal Nahar, Advocate, for the Appellants and Shri R K Dwivedi, Additional Commissioner, Authorised Representative, for revenue.

2.2 Learned Advocate submits, the main party i.e. M/s Indo Rama Synthetics (I) Ltd against whom the demand of duty has been confirmed have got the matter settled under Sabka Vishwas Legal Dispute Resolution Scheme 2019 (SVLDRS), and there appeals have been dismissed as deemed withdrawn. The two appellants whom we are concerned now, have left the company of main appellant long back and are not traceable. If they would have made application for settlement under the said scheme, the entire penalty imposed upon them could have been waived. However matter be adjourned so that she can trace these appellants on whom penalties are imposed and seek instructions from them.

2.3 Learned Authorized Representative re-iterates and submits the benefit of SVLDRS is available to appellant subject to the condition that they make proper application to proper authorities under the scheme. Since appellants have not approached the proper authority under the scheme, the benefit of scheme cannot be extended to them. The appellants were actively involved in day to day functioning of the unit and hence the order of Commissioner imposing penalty upon the appellants cannot be faulted with.

3.1 Since matter after settlement of the case of main party under SVLDRS is within very narrow compass, we take up these appeals for consideration.

3.2 The reasons for imposing penalty under rule 26 of Central Excise Rules, 2002, have been recorded by the Commissioner in para 61 of his order, as follows:

"61. As regards, the proposed imposition of penalty on Noticee No. 3 (Shri D. Chatterjee) & 4 (Shri Ramesh Deshpande) under Rule 26 of Central Excise Rules, 2002, I observe that both the Noticees are engaged in day-to-day activity / affairs of the company and were well aware of prescribed procedure and Rules in relation to Registration. Thus the act of applying for Central Excise Registration for DTY Section by misstating the facts indicate disregard to the legal provisions. The act of omission & commission committed by the Noticee No 3 & 4 revealed that they have not ensured adherence to the Law & procedure of Central Excise but intentionally concerned themselves with the mis-declaration & were also instrumental in removal of impugned excisable goods without payment of appropriate duty & therefore cannot escape from penal action & thereby rendered themselves liable for penal liability under the provisions of Rule 26 of Central Excise Rules, 2002."

3.3 Rule 26 of the Central Excise Rules, 2002 reads as follows:

" *(1) 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 higher."*

3.4 From the perusal of the para 61 of impugned order, it is evident that penalty has been imposed upon the appellant for the reason that they were the employees of the Company and were responsible for handling the day to day activities/affairs. Commissioner has not established the element of "mens rea", which is an essential ingredient for imposition of penalty under Rule 26 of the Central Excise Rules, 2002.

3.5 Hon'ble Karnataka High Court has in the case of Vijaya Steels Pvt Ltd [2012 (282) ELT 215 (Kar)] has after taking note of Rule 26, held as follows:

"9. *For application of the Rule, the condition precedent is any excisable goods which he knows or reason to believe are liable to* *confiscation under the Act or the Rules, then penalty is leviable under the aforesaid provision.*

10. *In the instant case, admittedly no excisable goods are confiscated. The offence alleged against these respondents is, they were not diligent in seeing that the cheques issued towards payment of the excise duty were whether encashed or not. Therefore, the said offence does not fall under Rule 26 of the Excise Rules."*

3.6 Hon'ble Punjab and Haryana High Court has in the case of Vee Gee Faucet Pvt Ltd [2015 (329) ELT 76 (P&H)], held as follows:

"27. *In respect of penalties imposable under Rule 26, again the penalty is payable if a person acquires possession of, or in any manner deals with any excisable goods 'which he knows or has reason to believe' are liable to confiscation under the Act. Such provision again makes the mens rea a necessary ingredient for imposition of penalty, as held by the Supreme Court in Pepsi Foods Ltd. case (supra).*

28. *In view of the above, we find that the Revenue has not been able to prove the intention to evade the payment of duty or the fact that the assessee knew or has reason to belief that the goods used are liable to be confiscated under the Act. The Tribunal is right in setting aside the order of imposition of penalty."*

3.7 Since the impugned order fails to establish the ingredient of "mens rea" on the part of the Appellants who were otherwise performing their duties as employee of the company, in view of the above orders of Hon'ble High Court, we are not in position to uphold the penalties imposed on the appellants in these two appeals.

3.8 Hon'ble Punjab and Haryana High Court has in the case of Vikas Garg [2014 (306) ELT 94 (P & H)], held as follows:

"5. *Learned counsel for the appellant vehemently argued that the conclusion of proceedings under Section 11A(2) of the Act does not absolve the partners from the penalty proceedings initiated separately under Rule 26 of the Rules.*

6. *We do not find any merit in the said argument. Once the proceedings against the firm stand concluded, penalty proceedings against partners of the firm cannot continue as Rule 26 of the Rules is not an independent provision but has to be read with Section 11A of the Act. The firm has satisfied the due of the Revenue, therefore, the imposition of penalty under Rule 26 of the Rules are not justified."*

3.9 In view of the above referred decision, once the issue of the main company against whom the demand for duty was made under Section 11A of Central Excise Act, 1944, has been settled under SVLDRS, case for imposition of penalty under Rule 26 on the employees will fail. This exactly is prescribed by the scheme also. The only requirement is that person on whom penalty is imposed makes application under the scheme.

4.1 Accordingly the appeals are allowed.

(Order pronounced in the open court)

(Sanjiv Srivastava)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

tvu