CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, WEST ZONAL BENCH AT MUMBAI

Excise Appeal No. 88227 of 2018

(Arising out of Order-in-Appeal No. SM/CGST & CX/Bhiwandi/APP-103/17-18 dated 13.03.2018 passed by Commissioner of CGST & Central Excise (Appeals), Bhiwandi)

M/s. Shah Foils Limited .....**Appellant**
1820/1, Santej Khatraj Road,
Opp. Raj Nagar Bus Stop,
Near GEB Sub Station, Taluka Kalol,
District Gandhinagar, Gujarat

VERSUS

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

WITH

(i) Excise Appeal No. 88228 of 2018 (M/s. Shah Foils Limited) (Arising out of Order-in-Appeal No. SM/CGST & CX/Bhiwandi/APP-94/17-18 dated 21.03.2018 passed by Commissioner of CGST & Central Excise (Appeals), Bhiwandi)**; (ii) Excise Miscellaneous Application (Cross) No. 86765 of 2018 in Excise Appeal No. 88229 of 2018 (M/s. Shah Foils Limited)** (Arising out of Order-in-Appeal No. SM/CGST & CX/Bhiwandi/APP-104/17-18 dated 13.03.2018 passed by Commissioner of CGST & Central Excise (Appeals), Bhiwandi)**; (iii) Excise Appeal No. 89564 of 2018 (M/s. Shah Foils Limited)** (Arising out of Order-in-Appeal No. NA/GST-A-II/MUM/422/17-18 dated 27.02.2018 passed by Commissioner of CGST & Central Excise (Appeals-III), Mumbai)**; (iv) Excise Appeal No. 85312 of 2019 (Shri Kartik Shah)** (Arising out of Order-in-Appeal No. NSK/EXCUS/000/APPL/353/18-19 dated 18.09.2018 passed by Commissioner of CGST & Central Excise (Appeals), Nashik)

Appearance:

Shri, Rajesh Ostwal, Advocate for the Appellant
Ms. Anuradha Parab along with Shri N.N. Prabhudesai, Authorized Representatives for the Respondent

CORAM:
HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)

FINAL ORDER NO. A/86982-86986/2021

Date of Hearing : 01.10.2021
Date of Decision: 01.10.2021

PER: S.K. MOHANTY

The issue involved in these appeals for consideration by the Tribunal is, whether the appellants are liable for penalty under the *erstwhile* Rule 26 of the Central Excise Rules, 2002 for the alleged offence that only Cenvatable invoices were issued to various customers, without actual supply of the goods.

2. The learned Advocate appearing for the appellants submitted that the show cause proceedings initiated from the same investigation dated 07.09.2012 and the orders passed by the department were adequately dealt with by the Ahmedabad Bench of this Tribunal and vide order dated 18.01.2019 {2019 (1) TMI 1162 – CESTAT AHMEDABAD}, penalties imposed on the appellants were set aside and the appeals were allowed in their favour. He further submitted that the issue involved in these appeals are entirely identical and arising out of the same investigation conducted on 07.09.2012, the impugned orders passed by the learned Commissioner (Appeals) should be set aside by allowing the appeals in favour of the appellants. The learned Advocate also submitted that the issue arising out of the present dispute is no more open for any debate inasmuch as the order dated 18.01.2019 (supra) passed entirely on same set of facts was affirmed by the Hon'ble Gujarat High Court, reported in 2020 (372) ELT 632 (Guj.) and SLP filed by Revenue before the Hon'ble Supreme Court was also dismissed, as reported in 2021-VIL-03-SC-CE. Thus, the learned Advocate pleaded for setting aside the impugned orders passed by the learned Commissioner (Appeals).

3. On the other hand, the learned ARs appearing for Revenue reiterated the findings recorded in the impugned order and further submitted that since the buyers of impugned goods and other persons have specifically stated in the statements recorded under summon that the goods were not actually supplied by the appellants herein and only invoices were issued, facilitating availment of fraudulent Cenvat credit, the appellants are exposed to the penal consequences provided under Rule 26 *ibid.*

4. Heard both sides and perused the records.

5. On examination of the case records, I find that the department had not conducted any detailed enquiry in the factory of the appellants to ascertain whether the impugned goods were in fact manufactured and cleared under the cover of central excise invoices to the buyers. I also find that the impugned proceedings were initiated by the department solely based on the statements recorded from the third party and no corroborating documentary evidences were relied upon in support of confirmation of the adjudged penalties. Further, the facts are also not in dispute that the proceedings from the same investigation dated 10.07.2012 conducted by the DGCEI, Mumbai Zonal Unit were the subject matter of dispute before the Ahmedabad Bench of this Tribunal and that vide order dated 18.01.2019 (supra), the Tribunal has set aside

imposition of penalties in the orders passed by the jurisdictional Commission (Appeals), holding that the appellants have delivered the goods along with invoices and that reliance places on the ledger account "Bill Condition" is not sustainable. The relevant paragraphs in order dated 18.01.2019 (supra) are extracted herein below:-

> *"23. The demand has also been made against Appellant on the ground that they issued invoices without delivery of goods, the statement of Shri Pravin Vasant Mehta of M/s Jigar Plast was recorded on 13.12.2013 wherein he has stated that sale invoices of the Appellant without delivery of goods has been reversed. However we find that Shri Pravin Mehta has nowhere stated that they have purchased goods from M/s SFL. He has stated that all the goods were procured by M/s Jigar Plast through broker Shri Atul Parekh. Shri Pravin Mehta also stated that Shri Atul Parekh has received goods and invoices from the SFL in the name of various parties including M/s Jigar Plast and whenever they received intimation from Shri Atul Parekh regarding receipt of goods from Appellant, M/s Jigar Plast prepared job work challan in the name of their job worker M/s Shree Ram Steels where the goods were unloaded directly. It is also appearing from the statement of brokers viz. Shri Chhail Singh Deora dt. 26.11.2013 that for purchase of goods they had to take invoice in name of any party. Same statement has been given by Shri Narendra Bhai, broker in his statement dt. 21.11.2013. It is therefore clear that whenever the invoice was issued by the Appellant, the goods were also cleared against such invoice. In such case the Appellant cannot be found faulted with. Even it is clear that Shri Kartik Shah in his statement dt. 28.01.2014 when questioned in respect of "Sankalp Vat Collection" has stated that the Appellants have always cleared goods on payment of duty. The adjudicating authority has held that Shri Kartik Shah with reference to "Sankalp Vat Collection" has stated that the conclusion by the officer that only invoice has been issued is correct. We find that first of all the legitimacy of data found in pendrive is not free from doubt. Further in view of above findings it is clear that the Appellant has consigned the goods to their buyers through M/s SFPL. The goods were handed over to the parties/ brokers from Vasai godwn by M/s SFPL and the Appellants had no role to play in such delivery of goods. There is no evidence at the Appellant's end that they issued any invoice without delivery of goods. We therefore found that the contention of the revenue that the Appellant issued invoice without actual clearance of goods is not sustainable.*
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> *24....*
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> *25. As regard impugned Order-in-appeals passed by Commissioner (Appeals), Rajkot and Surat, we find that the impugned orders has relied upon the ledger "Bill condition" to hold that only bills were supplied without any actual delivery. Also the statements of the brokers and the intermediary dealers and buyers has been relied upon. The Appellant has pointed out that the findings are merely on basis of statements and without any support of documentary evidence. That merely on basis of records or papers of third party the allegation cannot be sustained. The Appellant has also relied upon the judgments in case of Dhruv Dyestuff Pvt. Ltd. 2016 (339)*

ELT A 131 and Kubber Tobaco India Ltd. 2016 (338) ELT 013 that for relying upon the statements the provisions of section 9D of the Central Excise Act has to be followed. He also relied upon the Tribunal order in case of Dhakad Metal Corporation 2015 (330) ELT 561 (TRI) that on the basis of confessional statement without corroborative evidence, the demands cannot be raised. That Shri Kartik Shah in his statement dt. 28.01.2014 and 29.01.2014 had clearly stated that the diversion of the goods, if any, may have occurred due to diversion of goods by broker of M/s SFPL and that all clearances made by them were under invoices. He has pointed out entries out of "Bill condition" ledger were of invoices in respect of which lorry receipts and Form no. 402 submitted to Gujarat Vat Department for movement of said goods is also available. He submits that the goods were always removed on invoice and the diversion took place later. We find that there is no physical/ material evidence of Appellant having issued invoice without accompanying goods. Only on the basis of pen drive seized from place outside the factory/ premises of Appellant and which itself is highly doubtful as discussed by us in foregoing paras, we are of the view that it cannot be said that the Appellant M/s SFL issued only invoices without actual clearances. We therefore hold that the impugned Orders-in-appeals in as much as it imposed penalty upon the Appellant under rule 26 (2) are not sustainable. We therefore set aside the impugned order in as much as it imposes penalty against the Appellants."

6. Therefore, I am of the considered view that the present issue involved in these appeals is no more *res integra* inasmuch as it cannot be concluded that the appellants did not issue any invoices accompanying the goods. Accordingly, imposition of penalty cannot be sustained.

7. In view of the above discussions, I do not find any merits in the impugned orders passed by the learned Commissioner (Appeals). Accordingly, by setting aside the same, the appeals are allowed in favour of the appellants. Cross objection filed in Appeal No. E/88229/2018 is disposed of.

(Operative part of the order pronounced in the open court)

(S. K. Mohanty)
Member (Judicial)

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