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

Excise Appeal No. 848 of 2012

(Arising out of Order-in-Appeal No. BC/345-347/RGD/2011-12 dated 29.02.2012 passed by the Commissioner of Central Excise (Appeals), Mumbai-III, Belapur)

Shri Sameer S. Chaubal **Appellant**
Gala No.1, Vaishali Apartments,
Near Poynad ST Stand, Poynad,
Tal. Alibag, Dist. Raigad.

Vs.

Commissioner of Central Excise & ST, Raigad **Respondent**
Utpad Shulk Bhavan, Plot No.1, Sector 17,
Khandeshwar, Navi Mumbai 410 206.

Appearance:

None for the Appellant
Shri Dhirendra Kumar, Joint Commissioner, Authorised Representative for the Respondent

CORAM:

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

Date of Hearing: 26.10.2022
Date of Decision: 26.10.2022

FINAL ORDER NO. A/86024/2022

PER: SANJIV SRIVASTAVA

This appeal is directed against Order-in-Appeal No. BC/345-347/RGD/2011-12 dated 29.02.2012 passed by the Commissioner of Central Excise (Appeals), Mumbai-III, Belapur, whereby the Commissioner (Appeals) has held as follows:-

"In the background of the above findings, the impugned order sustains and the appeals filed by the appellants are rejected."

1.2 By Order-in-Original No. Raigad/ADC/86/10-11 dated 18.02.2011, the Additional Commissioner of Central Excise, Raigad, has held as follows:-

"ORDER

(i) I confirm the demand of Rs.49,39,117/- (Forty Nine Lakhs Thirty Nine Thousand One Hundred and Seventeen only) demanded vide Show Cause Notice issued under F.No. V/PI/Gr-II/RGD/43/AAPL/Inquiry/2007/1621 dated 29-01-2010 against (1) M/s. Abhiruchi Aqua Pvt Ltd, situated at Village Khirkindi (Tambati), Post Donwat, Tal- Khalapur, Dist- Raigad and order recovery of the same under proviso to Section 11A (1) of the Central Excise Act, 1944. The amount of Rs 4,00,000/- (Rs four lakhs only) paid by the assessee that they have deposited being an amount of Rs. 2,00,000/- vide GAR-7 Challan dtd. 30.10.2007, as Central Excise duty and further deposit of an amount of Rs. 2,00,000/- vide GAR-7 Challan dtd. 10.01.2008 as Central Excise duty, is appropriated towards confirmed demand.

(ii) I order that the goods valued at Rs.3,24,68,614/- should be confiscated under Rule 25 of the Central Excise Rules 2002 and in case the said goods are not available for confiscation, I impose redemption fine in lieu of confiscation of Rs 30,00,000/- (Thirty Lakhs only).

(iii) I impose penalty of Rs.49,39,117/- (Forty Nine Lakhs Thirty Nine Thousand One Hundred and Seventeen only) on the assessee under Section 11AC of the Central Excise Act, 1944.

(iv) I order recovery of interest the on the amount confirmed at (A) above, at applicable rate from the assessee under the provisions of Section 11AB of the Central Excise Act.

(v) In terms of Section 11AC, 1 proviso, in case the duty, penalty and interest are paid within 30 days of the communication of this order, the amount of penalty shall be 25% of the duty demanded.

(v) I reject the prayer of Shri Ashok Balkrishna Wartak, General Manager, of the assessee, and impose a penalty of Rs 10,00,000/ (Ten Lakhs only) on him under rule 26 of Central Excise Rules 2002.

(vi) I reject the prayer of Shri Sameer S. Chaubal, Owner of M/s S. R. Traders, and impose a penalty of Rs 2,50,000/- (Two Lakhs Fifty thousand only) on him under rule 26 of Central Excise Rules 2002

(vii) I reject the prayer of Shri Pawan Atmaram Agarwal, Management Representative, M/s. Iceberg Foods Ltd, and impose a penalty of Rs 2,50,000/- (Two lakhs Fifty Thousand only) on him under rule 26 of Central Excise Rules 2002."

2.1 Appeal No. E/836/2012 of other appellant (Shri Ashok Balkrishna Wartak) was dismissed by us as being settled under SVLDRS, vide order No. A/85650/2022 dated 18.07.2022. This appeal is filed by Shri Sameer S. Chaubal on whom a penalty of Rs.2,50,000/- has been imposed under Rule 26 o Central Excise Rules, 2002.

2.2 None was present for the appellant even today. The matter was taken up for consideration after hearing Shri Dhirendra Kumar, Joint Commissioner, Authorised Representative for the Revenue.

3.1 Learned AR relied upon the decision in the case of Dolphin Metals I Ltd. [2022 (1) TMI – CESTAT Ahmedabad] wherein the following has been held:-

" *….. Therefore, this defense of the appellant is of no help to them. It is also a fact on record that M/s Nisha Industries who had availed the Cenvat Credit against the demand of Cenvat Credit amount, they had opted for the Sabka Vishwas (Legacy & Dispute Resolution) Scheme, 2019. Though the opting of SVLDRS should not have any bearing on the other cases who are contesting before this Tribunal but it shows that M/s Nisha Industries has accepted the demand of fraudulent Cenvat Credit. Accordingly, the appellant is liable for penalty under Rule 26 (2) for wrongly passing of the credit. …."*

3.2 We have no dispute with the observation made by the Tribunal in the above order.

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

*"**Penalty for certain offences.** — (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 greater.*

***Provided** that where any proceeding for the person liable to pay duty have been concluded under clause (a) or clause (d) of sub-section (1) of section 11AC of the Act in respect of duty, interest and penalty, all proceedings in respect of penalty against other persons, if any, in the said proceedings shall also be deemed to be concluded.*

(2) Any person, who issues -

(i) an excise duty invoice without delivery of the goods specified therein or abets in making such invoice; or

(ii) any other document or abets in making such document, on the basis of which the user of said invoice or document is likely to take or has taken any ineligible benefit under the Act or the rules made thereunder like claiming of CENVAT credit under the CENVAT Credit Rules, 2004 or refund, shall be liable to a penalty not exceeding the amount of such benefit or five thousand rupees, whichever is greater."

3.4 From the perusal of the said rule, it is evident that penalty can be imposed in terms of this rule only on ascertainment of the amount of duty involved in the goods handled as per the said rule. In the present case both the orders are totally silent on the quantum of duty sought to be evaded. Further, nothing has been recorded in the impugned order as to what type of role of the appellant in the case of duty evasion. In para 19, the Commissioner (Appeals) has just recorded as follows:-

"19. The arguments of the appellant No.3 that the statements and Panchanama were recorded under coercion does not hold water for the reason that Panchanama is recorded before two independent Panchas and statement is recorded by a gazatted officer after making the accused understand the meaning and reasons for the statement. Raising hackles after few years only show the appellants attitude to evade from the scope of the law. Hon'ble Tribunal in the case of Dr. Writer's Food Products, held that (2009 (242) E.L.T. 381 (Tri. Mumbai)) "Penalty - Personal penalty on General Manager - Clandestine removal - No goods involved, only invoices moved Merely because GM not physically dealt with goods removed clandestinely, no relief from imposition of penalty to be given". Hence, imposition of penalty under Rule 26 is just and legal for all the wrongdoings done by the Appellant No.3.

In the backdrop of the above findings, the impugned order sustains and the appeals filed by the appellants are rejected."

3.5 In absence of any finding to the effect that Rule 26 gets attracted in the present case, we are not in a position to uphold the impugned order upholding imposition of penalty under Rule 26 of the Central Excise Rules, 2002.

4.1 Appeal is allowed.

(Order pronounced in the open court)

(Sanjiv Srivastava)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

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