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

Excise Appeal No. 85487 of 2013

(Arising out of Order-in-Original No. 98/NG/COMMR/TH-II/2012 dated 26.11.2012 passed by the Commissioner of Central Excise, Thane-II)

Paresh B. Patel **Appellant**
Director, M/s. Shreeji Aluminium Pvt. Ltd.,
Survey No. 214/1, Near Canal, Dadra (UT)

Vs.

Commissioner of Central Excise, Thane-II **Respondent**
3rd Floor, Navprabhat Chambers, Ranade Road,
Dadar (W), Mumbai 400 028.

WITH

Excise Appeal No. 85506 of 2013

(Arising out of Order-in-Original No. 98/NG/COMMR/TH-II/2012 dated 26.11.2012 passed by the Commissioner of Central Excise, Thane-II)

Salim Saheb Patel **Appellant**
Prop. B.S. Roadways,
25, Simit Shopping Centre,
Below Paradise Hotel, GIDC,
Char Rasta, Vapi.

Vs.

Commissioner of Central Excise, Thane-II **Respondent**
3rd Floor, Navprabhat Chambers, Ranade Road,
Dadar (W), Mumbai 400 028.

AND

Excise Appeal No. 85507 of 2013

(Arising out of Order-in-Original No. 98/NG/COMMR/TH-II/2012 dated 26.11.2012 passed by the Commissioner of Central Excise, Thane-II)

Shreeji Aluminium Pvt. Ltd. **Appellant**
Survey No. 214/1, Near Canal, Dadra (UT)

Vs.

Commissioner of Central Excise, Thane-II **Respondent**
3rd Floor, Navprabhat Chambers, Ranade Road,
Dadar (W), Mumbai 400 028.

Appearance:

Shri Mrugesh Pandya, Advocate, for the Appellants in appeal E/85487 & 85507/2013
None for the Appellant in appeal E/85506/2013
Shri Amrendra Kumar Jha, Deputy Commissioner and Shri P.K. Acharya, Superintendent, Authorised Representatives for the Respondent

CORAM:

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

Date of Hearing: 13.04.2023
Date of Decision: 13.04.2023

FINAL ORDER NO. 85857-85859/2023

PER: SANJIV SRIVASTAVA

These appeals are directed against order in original No. 98/NG/COMMR/TH-II/2012 dated 26.11.2012 passed by the Commissioner of Central Excise, Thane-II. By the impugned order, Commissioner has held as follows:-

"*ORDER*

In view of the above discussion and findings, I pass the following order:-

(i) In view of the fact that the SCN dated 21.10.2011 has been settled by the Hon'ble Settlement Commission vide Order No.18 / FINAL ORDER/CEX/KNA/2012 dated 27.02.2012, the proceedings against Ms. Arrow Engineers and Shri B.Nagraja Rao, Partner in M/s. Arrow Engineers are already settled and no further action is required to be taken in this Order-in-Original.

(ii) I impose a penalty of Rs.25,00,000/-(Twenty-five lakhs only) on M/s. Shreeji Aluminum Pvt. Ltd under Rule 2(2)(i) of the Central Excise Rules, 2002.

(iii). I impose a penalty of Rs.25,00,000/-(Twenty-five lakhs only) on Shri Paresh Babubhai Patel, Director M/s.Shreeji Aluminum Pvt.Ltd under Rule 26(2)(1) of the Central Excise Rules, 2002.

(iv) I impose a penalty of Rs.5,00,000/-(Five lakhs only) on Shri Salim Saheb Patel, Proprietor of M/s Patel Roadways, Vapi under Rule 26(2)(ii) of the Central Excise Rules, 2002."

2.1 M/s. Arrow Engineers, 11 & 11B 2/102, Arrow Industrial Estate, K T Industrial Park, Billal Pada, Vasai (East), Dist. Thane - 401 202 (hereinafter referred to as M/s. Arrow), are registered with the Central Excise Department for. manufacture of Control Panel/Bus duct falling under Chapter Heading No.85 of First schedule to the Central Excise Tariff Act, 1985 (CETA 1985). They are also availing the CENVAT Credit facility as per the law.

2.2 Intelligence gathered revealed that Appellant 1, manufacturers of Aluminum Extruded Profile (Hollow Solid and Flat bar etc.) falling under Chapter 76 of the Schedule to CETA 1985, were merely providing invoices showing payment of Central Excise duty without actual delivery of corresponding goods to the recipients of the said invoices in order to fraudulently pass CENVAT credit to such customers. The intelligence also indicated that M/s. Arrow was one such manufacturer who were obtaining/ receiving duty paid invoices from Appellant 1 for supply of Aluminum. Extruded Profiles without actual receipt of the goods.

2.3 Based on the above intelligence the factory premises of the Appellant 1 and Appellant 3 the transporter, along with premises of M/s. Arrow Engineers were searched. Detailed verification carried out from transporter about the vehicles mentioned in the invoices of Appellant 2 for supply of Aluminium Extruded Profiles revealed that only Lorry Receipts (LRs) were provided without actual transport of goods, thereby also revealing that in doing so a large amount of wrong and undue CENVAT credit was passed on to and availed by the assessee namely, M/s Arrow Engineers, Vasai.

2.4 Statement of Shri Paresh Babubhai Patel, (Appellant 2) Director of Appellant 1 was recorded under Section 14 of the CEA, 1944 on 29.09.2010 wherein he interalia stated that their unit was a Private Limited company and he was one of the Directors of the company; that the other director of their company was Shri Babaubhai K Patel; that he agreed with the facts narrated in all the above said panchnamas and Statements shown to him; that he further stated and clarified that as per the directions given by him, Shri Asit Kumar Mondal had prepared duty paid Central invoices of their unit and obtained LR'S of M/s.B.S.Patel Roadways, Vapi in favour of M/s.Arrow Engineers, Vasai, however they had not at all supplied any goods i.e. Aluminium Extruded Profile (Hollow/Solid) to the above said firm as mentioned in relevant invoices issued to them. He further stated that in respect of payments received against the invoices issued in favour of M/s.Arrow Engineers, Vasai, he had given cash amount by deducting their commission to a person informed by Shri B.Nagraja Rao, Partner of M/s. Arrow Engineers and received the cheque of invoice value.

2.5 Appellant 2 was overall in-charge of the entire activity of the factory including the production and clearance related work of Appellant 1 and had Shri Asit Mondal to commit the aforementioned offences. Investigation in the matter has revealed that Shri Paresh Patel was involved in preparing Central Excise invoices, mentioning vehicle numbers randomly on the invoices, showing transportation of excisable goods by attaching bogus LRs of transporters and returning the cheque amount for the bill/invoice in cash to the person of M/s Arrow. Shri Paresh Patel had knowingly and fraudulently prepared and issued invoices so as to enable M/s Arrow to avail inadmissible CENVAT credit and therefore knew or had reasons to believe that the goods shown to be cleared on payment of duty were mere paper transactions. For these acts of omission and commission made by Appellant 2, he rendered himself liable for penal action under Rule 26 of the Central Excise Rules, 2002.

2.6 Appellant 3 the Proprietor of M/s B.S. Patel Roadways, Vapi is the main transporter who played a vital role and was instrumental in the commission of offence in as much as he had issued bogus LRs to show the transportation of consignments of Aluminium Extruded Profiles, from the factory of Appellant 1 to the factory of M/s Arrow Engineers, Vasai contrary to the facts that the consignments of Aluminium Extruded Profiles were never transported to M/s Arrow, Vasai. The company also raised freight bills for transportation from Dadra to the factory of M/s Arrow Engineers, Vasai to camouflage their illicit activity and received payment of freight charges by cheques from Appellant 1. The amount was returned in cash to Appellant 1 after deducting their commission of Rs.300/- per LR. By way of issuance of 46 bogus LRs showing the transportation of 281239.70 kgs. of consignments of Aluminium Extruded Profiles involving CENVAT credit of Rs.51,15,670/- from the factory premises of Appellant 1 to the factory of M/s Arrow Engineers, Vasai with intention to make-believe a semblance of transportation of 'Aluminium Extruded Profiles', enabled M/s Arrow Engineers to fraudulently avail CENVAT credit of Rs.51,15,670/-. These facts were also confirmed by Appellant 3 in his statement dated 25.09.2010 in as much as he had admitted that they had prepared only LRs to fake the transport of Aluminium Extruded Profiles to the factory of M/s Arrow Engineers, Vasai, thereby admitting his involvement in abetting M/s Arrow Engineers fraudulently availing CENVAT credit. For this complicity on part of Appellant 3 in the fraud he rendered himself liable to penalty under Rule 26 of the Central Excise Rules, 2002.

2.7 A show cause notice dated 21.10.2011 was issued to M/s.Arrow Engineers, Vasai asking them to show cause as to why

i. CENVAT credit amounting to Rs.70,25,769/- (Rs.68,31,825/-BED Rs. 1,40,802/ Education Cess +Rs.53, 142/- SHE Cess) wrongly availed by them on "Aluminium -Extruded Profiles" without receiving the same, should not be recovered under Rule 14 of CENVAT Credit Rules, 2004 read with Section 11A of the Act, by invoking extended period as per proviso to Sub-section(1) of Section 11A of the Central Excise Act, 1944. Since an amount of Rs.70,25,769/- was already debited vide RG23A Pt.l Entry No.40 dated 24.09.2010 and Entry No.266 dated 23.05.2011, why the same should not be appropriated against the present demand.

ii. the interest of Rs.17,59,708/- and Rs.8,96,178/- should not be recovered from them under Rule 14 of the CENVAT Credit Rules, 2004 read with Section 11AB of the Central Excise Act 1944. Since, the interest amount of Rs.17,59,708/- and Rs.8,96,178/- had already been paid by them vide GAR7 challan dated 14.12.2010 and 31.05.2011 respectively, why the same should not be appropriated against the present demand of interest

iii. penalty under Rule 15 of the CENVAT Credit Rules,2004 read with Section 11AC of the Act, should not be imposed upon them

2.8 Shri.B.Nagraja Rao, Partner of the assessee company was also asked to show cause as to why the penalty should not be imposed upon him under Rule 15 of the CENVAT Credit Rules, 2004 and Rule 26 of the Central Excise Rules, 2002 for the contravention discussed in SCN supra.

2.9 Appellant 1 was asked to show cause as to why the penalty should not be imposed upon them under Rule 25 of the Central Excise Rules, 2002.

2.10 Appellant 2 was asked to show cause as to why penalty should not be imposed upon him under Rule 26(2) of the Central Excise Rules, 2002.

2.11 Appellant 3 was asked to show cause as to why penalty should not be imposed upon him under Rule 26 of the Central Excise Rules, 2002 for the contravention discussed in paragraphs supra.

2.12 An application to Settlement Commission was made by M/s Arrow Engineers, Vasai and Shri B.Nagraja Rao, Partner as the co-applicant on 05.12.2011 under Section 35E of the Central Excise Act, 1944 interalia with a request to settle the impugned show cause notice dated 21.10.2011 and to grant immunity and waive the proposed penalty under Rule 15 of the CENVAT Credit Rules, 2004 read with Section 11AC of the Act amongst any other actions as per the Law.

2.12 Para 20.2 of the impugned order records the details of the order of settlement commission as follows:

"20.2 The Commission passed its Order 18/FINAL ORDER/CEX/KNA/2012 dated 27.02.2012 holding:-

(i) that the Central Excise Duty in the case was settled at Rs.70,25,769/-. The applicant having already paid the amount, the said settled amount was ordered to be appropriated against the paid amount.

(ii) The interest on the above duty liability was settled at Rs.26,55,886/-. Since the amount stood paid, there was no further interest liability.

(iii) The Bench imposed penalty of Rs.1,50,000/- (Rupees One lakh and fifty thousand only) on M/s.Arrow Engineers and Rs.50,000/-(Rupees Fifty thousand only) on Shri B. Nagraja Rao, the co-applicant and Partner of M/s.Arrow Engineers under Rule 15 of the Cenvat Credit Rules, 2004 read with Section 11AC of the Central Excise Act, 1944.

(iv) No further penalties were imposed and the applicant and co-applicant were directed to pay the same

within 30 days of the receipt of the Order by the applicant.

(v) *The Bench also granted immunity from prosecution."*

2.13 The Show Cause Notice against the three appellants before us was adjudicated by the impugned order. Aggrieved the appellants have filed this appeal.

3.1 We have heard Shri Mrugesh Pandya, Advocate for the Appellant 1 and Appellant 2. Appellant 3 was not represented at the time of hearing of appeal. We have heard Shri Amrendra Kumar Jha, Deputy Commissioner and Shri P K Acharya, Superintendent, Authorized Representatives for the revenue.

3.2 Arguing for the Appellant 1 & Appellant 2:

- The undisputed fact that the cenvat credit was availed by main Noticee i.e. Arrow Engineers without receipt of any goods in factory premises.
- no goods were available for the confiscation and the SCN dated 21.10.2011 has not made any proposal for confiscation of the goods.
- the main Noticee i.e. Arrow Engineers has accepted the liability and reversed the cenvat credit amounting to Rs.51,15,670/- availed by them on the basis of invoices. M/s Arrow Engineers has also paid interest amounting to Rs.17,59,708/- in respect of above cenvat credit availed.
- The SCN dated 21.10.2011 made proposal of Cenvat Credit amount to Rs.70,25,769/- wrongly availed by M/s Arrow Engineers along with interest amounting to Rs.26,55,886/-.
- Hon'ble Commissioner in spite of recording the fact that the main Noticee has settled the case under settlement commission a lenient view is required to be taken in respect of the three co-noticees but imposed the penalty to the appellant amounting to Rs.25,00,000/-.
- The Appellant submits that as per the settled legal position when the case is settled by the settlement commission the same is settled in its entirety and such a case then cannot be adjudicated qua other co-noticees. Reliance is placed on:
    - S.K. Colombowala [2007 (220) E.L.T. 492 (Tri. - Mumbai)]

  - Onkar S. Kanwar [2002 (145) E.L.T. 266 (S.C.)]
  - Mukesh Garg [2012(278) ELT 303 (Delhi High Court)]
  - D.P. Kothari [2001 (135) E.L.T. 669 (Tri. - Del.)]
  - Bhai Chand U. Doshi [2001 (128) E.L.T. 472 (Tri. – Del.).
  - Shitala Prasad Sharma [2005 (183) E.L.T. 21 (Tri. – Mumbai)]
  - Vijay R. Bohra [2010 (260) E.L.T. (Tri. Ahmd.)]
  - Windoors (India) [2009 (246) E.L.T. 345 (Tri. - Mumbai)].
  - Balaji Loha Pvt. Ltd. & Jay Prakash Agarwala [2013 (7) TMI 827 - CESTAT New Delhi]
- SCN dated 21.10.2011 has not made any proposal for confiscation of goods. As per the settled legal position the penalty under Rule 26 is not warranted where there being no proposal of confiscation in the show cause notice. The Appellant wants to rely upon judgments of various Tribunals:
  - RMG Polyvinayl India Limited, Arvind Goenka [2017 (7) TMI 1027 - CESTAT Allahabad].
  - Nicholas D'souza Garage [2015 (320)E.L.T. 579 (Tri. – Mumbai)] affirmed at [2015 (320) E.L.T. A251 (S.C.)]

3.3 Learned authorized representative reiterates the findings recorded in the impugned order.

4.1 We have considered the impugned order along with the submissions made in appeal and during the course of arguments.

4.2 For imposing the penalties impugned order records the following findings:

"26. As regards the other three co-noticees, I proceed to examine the charges individually. Investigations carried out by DGCEI against M/s. Shreeji Aluminium Pvt. Ltd. revealed that raw materials viz. Aluminium Extruded Profiles purported to be consigned from M/s. Shreeji Aluminium Pvt. Ltd., Dadra to M/s. Arrow Engineers, Vasai through the transporter viz. M/s.B.S.Patel Roadways were actually not consigned to M/s. Arrow Engineers, Vasai. M/s. Arrow Engineers had received only invoices from M/s.Shreeji Aluminium Pvt. Ltd. along with LRs of

M/s.B.S.Patel Roadways Vapi and no corresponding goods viz. Aluminium Extruded Profiles had entered in their factory premises as shown in the said invoices. Shri B.Nagraja Rao of M/s. Arrow Engineers had further stated that they were getting the amount back in cash against the cheques issued to M/s. Shreeji Aluminium Pvt. Ltd. after a deduction of 9% of the bill amount by the supplier i.e. M/s. Shreeji Aluminium Pvt. Ltd., Dadra. Further Shri Salim Saheb Patel in his statement has also admitted that they had issued bogus LRs transportation of Aluminium Extruded Profiles from M/s. Shreeji Aluminium Pvt. Ltd., Dadra to show that M/s. Arrow Engineer, Vasai. The vehicle numbers on such LRS were indicated on random basis. The freight payments made to transporter were later received back in cash by M/s. Shreeji Aluminium Pvt. Ltd., with a commission of Rs.300/- per LR to the transporter. Having accepted this fact, M/s. Arrow Engineers reversed the wrongly availed Cenvat credit of Rs.51,15,670/-in their RG23A Pt.ll, availed on the strength of invoices issued by M/s. Shreeji Aluminium Pvt. Ltd, Dadra(UT). M/s.Arrow Engineers also paid appropriate interest amounting to Rs.17,59,708/- vide GAR 7 challan dated 14.12.2010, debiting the amount in PLA vide entry at Sr.No.06 dated 14.12.2010.

26.1 It is also further established that M/s. Shreeji Aluminium Pvt.Ltd. engaged in the manufacture of articles of Aluminium Extruded Profiles had indulged in issuing invoices without dispatching finished goods and received payments against such invoices by way of cheques and the same were returned in cash to M/s. Arrow Engineers. Shri Asit Kumar Mondal, authorized signatory and Excise Clerk of M/s. Shreeji Aluminium Pvt.Ltd. in his statement dated 29.09.2010 has categorically admitted that they had only issued invoices and vehicle nos. were mentioned randomly on the invoices. It is further revealed that M/s.Shreeji Aluminium Pvt.Ltd. had suppressed the facts from the Department that they had issued only invoices without physical clearance of finished goods but on payment of Central Excise duty mainly to facilitate M/s Arrow Engineers take Cenvat credit in their book of accounts. It therefore, is now an admitted fact that a total Cenvat Credit of Rs.51,15,670/- was paid on the clearances of 28239.70 Kgs. Of Aluminium Extruded Profile, with intent to pass on undue CENVAT credit to M/s. Arrow Engineers *to defraud the government exchequer to the extent of irregular cenvat credit passed. In view of the same, the impugned notice was also issued to M/s. Shreeji Aluminium Pvt. Ltd. asking them to show cause as to why to penalty under Rule 25 of the Central Excise Rules, 2002 should not be imposed upon them.*

26.2 In reply to the said show cause notice, Trivedi and Gupta, Advocates for M/s. Shreeji Aluminium Pvt. Ltd vide their letters dated 09.12.2011, 09.10.2012 and 23.10.2012 submitted that as regards penalty on M/s.Shreeji Aluminium Pvt. Ltd., the same gets attracted only when the "violation" of any rules has been done with an intent to evade duty, as Rule 25 has to be read with Section 11AC of Central Excise Act, 1944 and in support of their defence they relied upon the judgment passed by Honb'le High Court of Gujarat, in the case of Saurashtra Cement Ltd. [2010(260)ELT 71(Guj)] wherein it was held that penalty under Rule 25 can be attracted only when there is an intention to evade duty and that there is no dispute over the fact that their client did not evade any duty or had any such intent, per se.

26.3 Agreed, in the instant case there was no physical delivery of Aluminium Extruded Profiles (or any consignment) by M/s. Shreeji Aluminium Pvt. Ltd, the manufacturer to M/s. Arrow Engineers, Vasai but mere issuance of excise duty invoices to this effect, the penalty provisions of Rule 25 (a), (b), (c) would not apply. As also the fact that there is no contravention of any of the provisions of Central Excise Rules or notifications issued under these rules with intention to evade payment of duty by M/s. Shreeji Aluminium Pvt. Ltd (in this case duty was paid by M/s. Shreeji Aluminium Pvt. Ltd on the purported clearances), the provisions of Rule 25(d) of the Central Excise Rules, 2002 (CER, 2002) will not apply. In this connection, Rule 26(2)(i) of the CER, 2002 is reproduced here verbatim "Any person, who issues an excise duty invoice without delivery of the goods specified therein or abets in making such invoice on basis of which the user of the said invoice 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 shall be liable to a penalty not exceeding the amount of such benefit or five thousand rupees, whichever is greater". In this context, I find that the "person" had not been defined under *the Central Excise Act, 1944 nor in the Central Excise Rules/ Cenvat Credit Rules, 2004. In the event thereof, I refer to the definition of "person" as defined under Section 3(42) of General Clauses Act, 1897, wherein the "person" shall mean to include any company, or association or body of individual, whether incorporated or not. Accordingly, I find that the penalty provisions of Rule26(2)(i) of CER, 2002 are applicable to the instant act committed by M/s. Shreeji Aluminium Pvt. Ltd in as much as they have issued excise duty invoice without actual delivery of the goods specified therein.*

26.4 I observe that the Supreme Court in J.K.Steel Ltd vs U.O.I [(1969)2SCR418(AIR1970SC1173)] has held that if the exercise of a power can be traced to a legitimate source, the fact that the same was purported to have been executed under different power does not vitiate the exercise of power in question. This is a well settled proposition of law. In this connection reference is also made to the decisions of the Apex Court in the case of R. Ralotaiah vs U.O.I [(1958)SCR 1052 = (AIR 1958 SC 232)] and in the case of Afzal Ullah VS. State U.P[(1964)4/SCR/1991/(AIR 1964 SC 264)]. Further, it is an admitted fact, supported by all the statements and panchnamas which have been shown to the noticees and co- noticees and the statements being corroborative in nature, and the fact that nowhere in the entire proceedings i.e from the time of investigation and submissions to the adjudicating authority, the fact of involvement of the three co-noticees in the fraud is disputed. In nut shell, quoting of wrong rule does not make the notice invalid.

27. Shri Paresh Babubhai Patel, Director of M/s. Shreeji Aluminium Pvt.Ltd was overall in-charge of the entire activity of the factory including the production and clearance related work of M/s. Shreeji Aluminium Pvt. Ltd and had as per his directions got Shri Asit Mondal to commit the aforementioned offences. Investigation revealed that Shri Paresh Patel was the master-mind in preparing Central Excise invoices, mentioning vehicle numbers randomly on the invoices, showing transportation of excisable goods by attaching bogus LRs of transporters and returning the cheque amount for the bill/invoice in cash to the person of M/s.Arrow Engineer, Vasai. Investigation has revealed that M/s. Arrow was the main conspirator in the conspiracy *hatched to defraud the exchequer in connivance with Shri Paresh Patel as Shri Paresh Patel had knowingly and fraudulently got the invoices prepared and issued so as to enable M/s. Arrow to avail inadmissible CENVAT credit and therefore knew or had reasons to believe that the goods shown to be cleared on payment of duty were mere paper transactions for the very fact that he was instrumental in receiving the cheque amount from M/s.Arrow Engineers towards the bills/invoices and cash flow back to M/s. Arrow Engineers after deducting 9% from the amount. For these acts of omission and commission made by Shri Paresh Babubhai Patel, the impugned notice proposed penalizing him under Rule 26(2) of the Central Excise Rules, 2002.*

27.1 In reply to the said show cause notice, the advocates M/s Trivedi and Gupta submitted that Mr.Paresh Babubhai Patel, Director of M/s. Shreeji Aluminium Pvt.Ltd had not issued any invoice per se, nor any other document was issued, in his capacity, on basis of which the so-called wrong credit was availed by M/s.Arrow Engineers. Further they also submitted that as regard the penalty against M/s.Shreeji Aluminium Pvt. Ltd. and Mr.Paresh Babubhai Patel, not withstanding and without prejudice to the above, even going by the charges in the subject SCN itself, only documents were raised by their clients, without actual delivery of goods to buyer and since there were no goods, question of confiscation does not arise; that under the circumstances ingredients of Rule26(1) are not fulfilled; that where the charge is as regards non-existent goods, there is no question of any person dealing with the same, since no goods were handled by their clients at all, which were shown to be cleared to the buyer, as per the charges levelled in the subject SCN itself and accordingly their clients cannot be held liable to any penalty under Rule26 of the Central Excise Rules, 2002 and that reference is drawn to the above cited decisions in support of their contention.

27.2 In this context, I refer to para 22 of the show cause notice in which penalty on Shri Paresh Babubhai Patel is sought to be imposed under Rule26(2) of the CER,2002 and not Rule26(1) ibid as misleadingly claimed supra by the advocates. As also in case of Shri Paresh Babubhai Patel, Director of M/s. Shreeji Aluminium Pvt. Ltd the contention of their advocate in their *submissions dated 09.10.2012 is that it is well settled law that penalty is not impossible on Board of Directors or Individual Directors of a company as they are not producers or manufacturers liable under Central Excise law and that they refer and rely upon the decision of the Honb'le High Court of Mumbai in the case of S.C.Kirloskar v/s. UOI reported in [1993(68)ELT533(Bom)]. However, I find that the ratio of judgment-relied upon in the case S.C.Kirloskar V/s. UOI is not applicable to the instant case as this judgment is applicable to a Public Limited Company whereas in the instant case Shri Paresh Babubhai Patel is the Director of a Private Limited Company.*

28. As regard Mr. Salim Saheb Patel, Trivedi and Gupta in their submissions have stated that requirement of Rule26(2) is that the person should raise any invoice/document or abet therein, on basis of which ineligible credit is availed; that raising of LR's does not fall within the mischief of the said Rule, since no credit can be avail on the basis of L.R.; that this also does not amount to abetting of making such invoice/document as well; that under the circumstances no penalty is imposable on Mr. Salim Saheb Patel. However, on this issue I find that the investigations have revealed that Shri Salim Saheb Patel, Proprietor of M/s B.S.Patel Roadways, Vapi, the main transporter played a vital role and was instrumental in the commission of offence in as much as he had issued bogus LRs to show the transportation of consignments of Aluminium Extruded Profiles, from the factory of M/s. Shreeji Aluminium, Dadra to the factory of M/s. Arrow Engineers, Vasai contrary to the facts that the consignments of Aluminium Extruded Profiles were never transported to Vasai. The company also raised freight bills for transportation from Dadra to the factory of M/s. Arrow Engineers, Vasai to camouflage their illicit activity. They received payment of freight charges by cheques. The amount was returned in cash to M/s Shreeji after deducting their commission. By way of issuance of 46 bogus LRs showing the transportation of 281239.70 kgs. of Aluminium Extruded Profiles involving CENVAT credit of Rs.51,15,670/- from the factory premises of M/s Shreeji, Dadra to the factory of M/s Arrow Engineers, Vasai with intention to make-believe a semblance of transportation of 'Aluminium Extruded Profiles' enabled M/s. Arrow Engineers to fraudulently avail CENVAT *credit of Rs.51,15,670/-. These facts were also confirmed by Shri Salim Saheb Patel in his statement dated 25.09.2010 in as much as he had admitted that they had prepared only LRs to fake the transport of Aluminium Extruded Profiles to the factory of M/s Arrow Engineers, Vasai, thereby admitting his involvement in abetting M/s Arrow Engineers to fraudulently avail the CENVAT credit of Rs51,15,670/-. Shri Salim Saheb Patel was therefore directed to show cause as to why penalty should not be imposed on him under Rule 26 of the CER, 2002.*

28.1 Investigations confirmed that Shri Salim Saheb Patel, Proprietor of M/s B.S Patel Roadways had helped the manufacturer's viz. M/s Shreeji to raise bogus/fake cenvatable invoices under the Central Excise law in order to fraudulently help M/s Arrow Engineers to avail CENVAT credit. They had not transported the goods, but yet, had issued Lorry receipts quoting bogus vehicle numbers and had thus, abetted in passing of the fake/bogus Cenvatable documents to M/s Arrow Engineers resulting into loss of duty amounting to Rs. 51,15,670/- to the Government. As such, I find that they had made themselves liable to penalty under Rule 26(2)(ii) in as much as they issued bogus Lorry receipts to support the duty paid invoices of M/s. Shreeji Aluminium Pvt.Ltd to give authenticity to the transport of the consignments, which never was and on the basis of these duty paid invoices, M/s. Arrow Engineers availed ineligible CENVAT credit. Thus in doing so he was instrumental in the making of such documents i.e. the fraudulent invoices on which wrong CENVAT credit was availed. And so penalty on the transporter is imposable under Rule26(2)(ii) for his role as the abettor.

29. Further, the advocate also proposed that notwithstanding and without prejudice to the above, considering the fact that the whole of credit alongwith interest stands reversed/paid by M/s. Arrow Engineers, a lenient view may be taken in the matter, so far as these co-noticees were concerned.

30. In this case the main noticee M/s. Arrow Engineers and its partner Shri B. Nagraja Rao approached the Hon'ble Settlement Commission and therefore they have taken a lenient view as regard imposition of penalties i.e Rs.1,50,000/- and Rs.50,000/- on them against the

demands of Rs.70,25,769/- on account of the fact that the said demand alongwith the interest had been paid by them and the matter settled. Since their matter has already been settled by the Hon'ble Settlement Commission, no further action now required to be taken against them in this Order-in-Original. I find that since a lenient view has been taken against the principal noticee, similar lenient view is required to be taken in respect of the three co-noticees."

4.3 The undisputed fact is that Appellant 2 and Appellant 3 where found supplying the bogus invoices without clearance of any goods to M/s Arrow to allow him take the CENVAT credit without receipt of any goods. The fraud on the part of the Appellant 1 and Appellant 2 in the act of supply of bogus invoices is not in dispute. M/s Arrow has admitted its liability and the facts are not in dispute. M/s Arrow had approached the settlement commission and after making complete disclosure of its liabilities have got the proceedings settled against them and its Director as have been noted by us in para 2.12, supra. Appellant's counsel relying on various decisions of this tribunal and courts argued that once the main noticee has settled the issue in settlement commission then the proceedings against the co-noticees should have abated. Admittedly if the co-noticees had approached the settlement case either along with the main noticee or on their own then it would have been for the Settlement Commission to admit or reject the application made and determine the terms of admission or rejection. In case the settlement commission would have admitted the applications of the co-noticee on whom the penalty has been proposed then they could have determined the penalty that needs to be imposed on them. By not approaching the settlement commission, appellant could not claim the benefit of the settlement made in the case of the main noticee. It is settled law that in the proceedings initiated each noticee has to answer the charges made against him individually and the matter needs to be determined independently against each of the co-noticee for his acts of omission and commission leading to fraud and evasion of duty. Some of the provisions of the scheme of settlement commission which are relevant for considering the arguments advanced by the appellant are reproduced below:

"Section 32I. Powers and procedure of Settlement Commission. -

(1) In addition to the powers conferred on the Settlement Commission under this Chapter, it shall have all the powers which are vested in a Central Excise Officer under this Act or the rules made thereunder.

(2) here an application made under section 32E has been allowed to be proceeded with under section 32F, the Settlement Commission shall, until an order is passed under sub-section (5) of section 32F, have, subject to the provisions of sub-section (4) of that section, exclusive jurisdiction to exercise the powers and perform the functions of any Central Excise Officer, under this Act in relation to the case.

(3) in the absence of any express direction by the Settlement Commission to the contrary, nothing in this Chapter shall affect the operation of the provisions of this Act in so far as they relate to any matters other than those before the Settlement Commission.

(4) the Settlement Commission shall, subject to the provisions of this Chapter, have power to regulate its own procedure and the procedure of Benches thereof in all matters arising out of the exercise of its powers, or of the discharge of its functions, including the places at which the Benches shall hold their sittings.

Section 32K. Power of Settlement Commission to grant immunity from prosecution and penalty. -

(1) The Settlement Commission may, if it is satisfied that any person who made the application for settlement under section 32E has co-operated with the Settlement Commission in the proceedings before it and has made a full and true disclosure of his duty liability, grant to such person, subject to such conditions as it may think fit to impose, immunity from prosecution for any offence under this Act 1[and also either wholly or in part from the imposition of any penalty and fine] under this Act, with respect to the case covered by the settlement:

Provided that no such immunity shall be granted by the Settlement Commission in cases where the proceedings for the prosecution for any such offence have been instituted before the date of receipt of the application under section 32E.

2[x x x]

(2) An immunity granted to a person under sub-section (1) shall stand withdrawn if such person fails to pay any sum specified in the order of the settlement passed under 3[sub-section (5) of section 32F within the time specified in such order] or fails to comply with any other condition subject to which the immunity was granted and thereupon the provisions of this Act shall apply as if such immunity had not been granted.

(3) An immunity granted to a person under sub-section (1) may, at any time, be withdrawn by the Settlement Commission, if it is satisfied that such person had, in the course of the settlement proceedings, concealed any particular material to the settlement or had given false evidence, and thereupon such person may be tried for the offence with respect to which the immunity was granted or for any other offence of which he appears to have been guilty in connection with the settlement and shall also become liable to the imposition of any penalty under this Act to which such person would have been liable, had no such immunity been granted.

Section 32L. Power of Settlement Commission to send a case back to the Central Excise Officer. -

(1) The Settlement Commission may, if it is of opinion that any person who made an application for settlement under section 32E has not co-operated with the Settlement Commission in the proceedings before it, send the case back to the Central Excise Officer having jurisdiction who shall thereupon dispose of the case in accordance with the provisions of this Act as if no application under section 32E had been made.

(2) or the purpose of sub-section (1), the Central Excise Officer shall be entitled to use all the materials and other information produced by the assessee before the Settlement Commission or the results of the inquiry held or evidence recorded by the Settlement Commission in the course of the proceedings before it as if such materials, information, inquiry and evidence had

been produced before such Central Excise Officer or held or recorded by him in the course of the proceedings before him.

(3) or the purposes of the time limit under section 11A and for the purposes of interest under section 11BB, in a case referred to in sub-section (1), the period commencing on and from the date of the application to the Settlement Commission under section 32E and ending with the date of receipt by the Central Excise Officer of the order of the Settlement Commission sending the case back to the Central Excise Officer shall be excluded.

Section 32M. - Order of settlement to be conclusive. -

Every order of settlement passed under sub-section (5) of section 32F shall be conclusive as to the matters stated therein and no matter covered by such order shall, save as otherwise provided in this Chapter, be reopened in any proceeding under this Act or under any other law for the time being in force."

4.4 Appellant has heavily relied upon the decision of the tribunal in case of S K Colombowala, to argue that the once the case of main noticee has been settled then the case against all the co-noticee is settled. We do not agree with the said submission for the reason that the above provisions quote, settlement commission as per the provisions of section 32I, 32K, 32L & 32M of the Central Excise Act, 1944 is not settling the case or the show cause notice issued, but to the person who has approached the commission, disclosing the true liability granting the immunity to the person from further penalty and prosecution. Section 32 I (3) makes this very clear that without specific direction nothing in this Chapter (On Settlement Commission) shall affect the operation of the provisions of this Act in so far as they relate to any matters other than those before the Settlement Commission. In our view the order of Tribunal which has ignored these specific provisions of the Act, is per-incurium and cannot be binding precedent.

4.5 In similar set of facts we also note that Hon'ble Punjab and Haryana High Court has in case of kay Iron Works (Jorioan) Pvt Ltd. [2018 (359) ELT 110 (P&H)] held as follows:

2.*CEA No. 98 of 2014 has been preferred by the appellant-assessee under Section 35G of the Central Excise Act, 1944 (in short, "the CEA Act") seeking quashing of final Order dated 20-*

8-2014, Annexure A.1, passed by the Customs, Excise & Service Tax Appellate Tribunal, New Delhi (in short, "the Tribunal") in Appeal No. E/476/2012, claiming following substantial questions of law :-

(i) ***"Whether Order passed by the learned Tribunal is sustainable when the Settlement Commission had settled the case of main notice?***

(ii) *Whether penalty under Rule 25 of the Central Excise Rules, 2002 is sustainable in case goods are not held liable to confiscation as there were no goods?*

(iii) *Whether maximum penalty is sustainable in case minimum penalty is not prescribed?*

(iv) *Whether the impugned order is perverse and contrary to record?*

(v) *Whether grave and palpable injustice would be caused to the Appellant if the respondents are permitted to execute the order?"*

5. A perusal of the order passed by the Tribunal shows that it was conceded by the assessee before the authorities below that the invoices were issued without even supplying any goods. It was also recorded that the Settlement Commission did not admit the case of the appellant and also that Settlement Commission nowhere had held that their order would be extended in the case of the appellant as well. With regard to the contention that the penalty under Rule 25 of the Rules could not be imposed as there were no goods involved, the Tribunal relying upon the judgment of this Court in V.K. Enterprises v. CCE, 2011 (266) E.L.T. 436, had held that the person purporting to sell goods could not say that he was not concerned with selling of goods and had not contravened the provisions of Rule 25 of the Rules. In such cases, the penalty was held to be imposable. The relevant findings recorded by the Tribunal in this regard read thus :-

I have considered the facts and submissions of both sides. At the outset, it is to be mentioned that the appellants have conceded that the invoices were issued without ever supplying any goods. As regards their contention that the order of

Settlement Commission in respect of M/s. Talbros would cover them too, it is seen that the settlement Commission itself did not admit their case and such non-admission was not on the ground that they would be covered by the main order in case of Talbros. The judgment in the case in K.I. International Limited (supra) takes note of the judgment in the case of S.K. Colombowala (supra) and holds that the benefit of the Settlement Commission's order cannot be extended to those who never approached the Settlement Commission. The learned Advocate stated that the order in case of K.I. International Limited has been stayed by the High Court, but I find that the stay is an interim stay on condition of 50% deposit and bank guarantee for the remaining amount which obviously means that what has been stayed is the consequential recoveries in terms of that order. As stated earlier, the Settlement Commission itself did not consider that the appellants would be covered by their order in case Talbros. As such, the contention of the appellants in this regard is not sustainable. The other contention of the appellants is that the penalty under Rule 25 cannot be imposed as there were no goods involved. It is seen that the Hon'ble Punjab and Haryana High Court in the case of Vee Kay Enterprises (supra) has discussed this very issue and has come to a finding that even in such cases, penalty can be imposed. The Hon'ble High Court observed that the person purporting to sell goods cannot say that he is not concerned with selling of goods and has not contravened the provisions of Rule 25 ibid. Relevant paras (9&10) of the said judgment are quoted below :

As regards applicability of provisions introduced on 1-3-2007 to alleged acts committed prior to the said date, the matter is covered by orders of this court referred to above which are not shown to be distinguishable. Accordingly, we hold that the amended provisions will not apply to the acts committed prior thereto.

In spite of non applicability of Rule 26(2), penalty could be levied as the appellant was concerned in selling or dealing with the goods which were liable to confiscation inasmuch as the appellant claimed to have sold the goods in respect of which the Cenvat Credit was taken. In such a case, Rule 25(1)(d) and

26(1) are also applicable. The person who purports to sell goods cannot say that he was not a person concerned with the selling of goods and merely issued invoice or that he did not contravene a provision relating to evasion of duty. The appellant issued invoices without delivery of goods with intent to enable evasion of duty to which effect a finding has been recorded and which finding has not been challenged. We are, thus unable to hold that appellant was not liable to pay any penalty.'

In the light of the foregoing, the appellants' contention that they are not liable to penalty under Rule 25 is untenable."

6. Further, the Tribunal had correctly held that the quantum of penalty in the circumstances of the present case could not be faulted on the ground that it was excessive."

4.6 The second issue which was raised by the appellant counsel has been considered in the impugned order in para 26.3 relying on the decision of the Hon'ble Apex Court. It is settled law till the time the power to perform an act can be traced in law, the notice issued cannot be vitiated just for reason of mentioning a wrong provision in the notice and adjudicating it in the provision wherein the power has been vested. Thus mere mention of Rule 25 in the Show Cause Notice and imposing penalty under Rule 26 will not vitiate the proceedings if it is found that penalty is imposable under the said rule. Hon'ble High Court has in case of Kay Iron Works, supra has held that penalty is rightly imposed under Rule 26.

4.7 Having considered the arguments advanced by the appellant's counsel we are of the view that penalty is impossible on the three appellants under Rule 26 of the Central Excise Rules, 2002 as has been held in the impugned order. However we are of the view that penalties imposed are excessive, taking in view the fact that Commissioner after taking the note of order of Settlement commission advocates for lenient view against the appellant. (Refer para 30 of the impugned order). Taking note of the fact and the penalties imposed on the M/s Arrow (Penalty of Rs 1,50,000/-) and its Shri B. Nagraja Rao Director (Penalty of Rs 50,000/-) we are of the view that ends of justice will be met by reducing the penalties on three appellants as follows:

Appellant	Penalty Imposed as per impugned order	Penalty Modified
Appellant 1	Rs 25,00,000/-	Rs 2,50,000/-
Appellant 2	Rs 25,00,000/-	Rs 50,000/-
Appellant 3	Rs 5,00,000/-	Rs 25,000/-

4.8 Thus we uphold the impugned order with above modifications as indicated in para 4.7 above.

5.1 Appeals partly allowed reducing the penalties imposed on the three appellants as indicated in para 4.7 above.

(Order pronounced in the open court)

(Sanjiv Srivastava)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

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