CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI

REGIONAL BENCH - COURT NO. I

Excise Appeal No. 88133 of 2013

(Arising out of Order-in-Original No. 16/SK/M-I/2013 dated 08.05.2013passed by the Commissioner of Central Excise, Mumbai-I)

Zapak Digital Entertainment Ltd. **.... Appellants**
401, Level-4, Infinity Mall, New Link Road,
Andheri (west), Mumbai – 400 053

Versus

Commissioner of Central Excise, Mumbai-I .... Respondent
Central Excise Building, M.K. Road,
Chruchgate (East), Mumbai – 400 020

Appearance:

Ms. Swati Agarwal, Advocate for the Appellant

Shri Rajiv Ranjan, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. M.M. PARTHIBAN, MEMBER (TECHNICAL)

FINAL ORDER NO. A/85512/2024

Date of Hearing: 06.05.2024

Date of Decision: 17.05.2024

PER: M.M. PARTHIBAN

This appeal has been filed by M/s Zapak Digital Entertainment Ltd. (hereinafter referred to as 'the appellants') assailing the Order-in-Original No. 16/SK/M-I/2013 dated 08.05.2013 passed by the Commissioner of Central Excise, Mumbai-I. This appeal has been filed against the impugned order only to the extent of imposition of penalty on the appellants under Rule 26 of the Central Excise Rules, 2002.

2. Briefly stated the facts of the case are that the appellants are engaged in the sale of CDs/DVDs bearing the brand name/trade name 'zapak' and 'zapak game CD'. The appellants were getting these CDs/DVDs manufactured through M/s KRCD (India) Pvt. Ltd., who is the manufacturer of Information Technology Software on CD/DVD falling under Tariff entry 8523 8020 of the First schedule of the Central Excise

Tariff Act, 1985. The appellants have placed various purchase orders for purchase/replication of CDs of different titles. The purchase orders placed by the appellants with the manufacturer M/s KRCD (India) Pvt. Ltd. *inter alia* indicated that the prices are inclusive of excise duty as a part of the terms and conditions of such supply. However, M/s KRCD (India) Pvt. Ltd. did not pay central excise duty and cleared the goods without payment of applicable duty. Based on information, necessary inquiry was conducted by the Department and show cause proceedings were initiated against M/s KRCD (India) Pvt. Ltd. and the appellants for demand of central excise duty and imposition of penalty on the manufacturer as well as on the appellants, as co-Noticee, under Rule 26 ibid. Upon adjudication of the same, the learned Commissioner had confirmed the adjudged demands proposed in the SCN dated 29.12.2011 and imposed penalties on the notices viz., M/s KRCD (India) Pvt. Ltd., Shri R. Agarwal, Director of M/s KRCD (India) Pvt. Ltd., M/s Zapak Digital Entertainment Ltd. and M/s Red Hat India Private Limited. As against the confirmation of adjudged demands against M/s KRCD (India) Pvt. Ltd. and penalty imposed on Shri R. Agarwal, Director of M/s KRCD (India) Pvt. Ltd., they have opted for SVLDR Scheme, 2019 to settle the dispute and upon obtaining the SVLDRS-4 certificates, the respective appeals pending before Tribunal were also dismissed as deemed withdrawal vide Final Order No. A/86205/2011 and A/86205/2011 both dated 07.04.2021. In the impugned order, penalty of Rs.5 lakhs alone was imposed on the appellants under Rule 26 ibid. Being aggrieved with the above order, the appellants have filed this appeal before the Tribunal.

3. Learned Advocate appearing for the appellants mainly contended that penalty under Rule 26 of Central Excise Rules, 2002 can be imposed only on individuals and not on company form of organizaton. In support of his stand, he cited the decision of the Tribunal in the following cases: -

(i) Kakateeya Fabs (P) Ltd., Simplex Infrastructures Ltd. Vs. CCE, Bhopal – 2018 (150) G.S.T.L. 350 (Tri.-Del.)

(ii) Zapak Digital Entertainment Ltd. Vs. CCE, Mumbai – 2023 (2) TMI 40 – CESTAT Mumbai

(iii) Apple Sponge and Power Ltd. Vs. Commissioner of Service Tax, Audit-I, Mumbai – 2018 (362) E.L.T. 894 (Tr.i-Mum.)

In view of the aforesaid decisions of the Tribunal, he prayed that the penalty imposed on the appellants be set aside.

4. Learned Authorized Representative appearing for the Revenue reiterates the findings recorded in the impugned order.

5. Heard both sides and perused the case records.

6.1 From the facts of the case, it is noted that the show-cause notice proposing for imposition of penalty on the appellants have been issued on the following specific grounds: -

> *"24. Noticee No. 3, M/s Zapak Digital Entertainment Ltd. though knowing that the "Zapak Game CDs/DVDs" cleared from the factory of Noticee No. 1 are excisable goods cleared without payment of appropriate central excise duty had concerned themselves in selling the excisable goods which were liable for confiscation because of the payable duties of excise evaded by the assessee company and thus, aided & abetted the Noticee No. 1 in contravention of the provisions of the Central Excise Act, 1944 and the rules made thereunder with intent to evade payment of central excise duty. Deliberate intention on the part of M/s Zapak Digital Entertainment Ltd. to evade central excise duty is obvious from the following facts:*
>
> > *(1) M/s Zapak Digital Entertainment Ltd. being large structured corporate entity having Licensor in USA it was their obligation to educate the replicators about the liability to pay central excise duty on 'Packaged Software' marketed by them especially when the software CDs were received by them in duly packed ready to sell condition (a fact confirmed by the statements of Shri Vaibhav Odhekar, Associate Vice President of M/s Zapak Digital Entertainment Ltd. , recorded on 30.07.2009, 31.07.2009 and 25.03.2011, Shri Narendra Kamat, Chief Financial Officer of M/s Zapak Digital Entertainment Ltd., recorded on 14.09.2009, 28.07.2010 and 14.11.2011.)*
> >
> > *(2) The purchase orders of M/s Zapak Digital Entertainment Ltd. did not mention anything about Central Excise duty payment and this fact made it convenient for M/s KRCD to evade payment of Central Excise duty.*
>
> *Therefore, they have rendered themselves liable for penalty under rule 26 of the said Rules."*

6.2 The above proposal for imposition of penalty against the appellants was decided by the learned Commissioner in the following manner: -

> *"61. As regards to the penalty proposed on Shri Rajiv G. Agarwal. Director of M/s KRCD., M/s Zapak and M/s Red Hat, I find that Shri Rajiv G. Agarwal was directly involved in the manufacture and clearance of Packaged Software without payment of Central Excise Duty. Shri Agarwal has played active role in the evasion of Central Excise Duty, as stated above, which has been admitted in his statements recorded on various dates. The facts of the case and*

evidence on record clearly show that Shri Rajiv G. Agarwal, M/s Zapak and M/s Red Hat were aware that the CDs/DVDs manufactured by M/s KRCD were Packaged Software attracting Central Excise Duty. There was no ambiguity in the Central Excise Tariff so far as classification of Packaged Software and levy of Central Excise Duty thereof, during the relevant period. Besides. admittedly. M/s KRCD was paying Central Excise Duty on selective basis and had not paid any Central excise Duty on the clearances of identical goods to M/s Zapak and M/s Red Hat. This is clearly a case of planned and systematic evasion of duty resorted by Shri Rajiv G. Agarwal. M/s Zapak and M/s Red Hat. Shri Rajiv G. Agarwal in his reply dated 21.02.13 has stated that the company had claimed exemption from payment of Central Excise Duty in terms of Notification No.6/2006 dated 01,03.2006. However, no such claim is found on the ER-1 returns filed by the assessee. M/s KRCD. The goods manufactured by M/s KRCD were declared as 'Compact Disc' obviously with intent to evade Central Excise Duty. Further, from the reply dated 23.04.12 of M/s Red Hat. it is seen that M/s Red Hat were aware that the CDs replicated by M/s KRCD were Packaged Software. M/s Zapak in their reply dated 22.03.13 have stated that they had fixed a price which was inclusive of Excise Duty and other taxes. If that is the case then the question arises as to why M/s Zapak did not raise any query when M/s KRCD did not charge any Excise Duty on the impugned goods cleared to them, though they were aware that the impugned goods were Packaged Software and eligible to Central Excise Duty.

62. The above factors clearly indicate that Shri Rajiv G. Agarwal, M/s Zapak Digital Entertainment Limited and M/s Red Hat India Private Limited have connived and indulged in evasion of Central Excise Duty on the clearance of the impugned goods. Therefore, I hold Shri Rajiv G. Agarwal, M/s Zapak Digital Entertainment Limited and M/s Red Hat India Private Limited liable to penalty under the provisions of Rule 26 of the Central Excise Rules. 2002. The contentions made by Shri Rajiv G. Agarwal, M/s Zapak Digital Entertainment Limited and M/s Red Hat India Private Limited with regard to penalty proposed on them are not tenable for the reasons mentioned above. Even the ease laws cited do not support the case.

xx xx xx xx xx

(6) I impose penalty of Rs.5,00,000/- (Rupees five lakhs only) on M/s Zapak Digital Entertainment Ltd. under the provisions of Rule 26 of the Central Excise Rules, 2002."

7. From the above, I find that the issue for decision in the present appeal is to determine whether the penalty under Rule 26 of the Central Excise Rules, 2002 can be imposed on the appellants as company. In this regard, the legal provisions under Rule 26 ibid is extracted and reproduced as under: -

***"RULE 26**. — (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."

8.1 From plain reading of the legal provisions contained in Rule 26, it transpires that the penalty under this rule can be imposed in specified situations given therein. One such situation is, that a person who does any act in acquiring possession or who in any manner deals with, the excisable goods which he knows that these are liable to confiscation can be imposed with penalty. The second situation is in respect of person, who is liable to pay duty upon issue of excise invoices, but issues such invoice without delivery of goods or issues it wrongly to enable the recipient to claim undue benefit. Thus, these provisions make it essential that a person should have the knowledge of the fact that the subject goods are being liable to confiscation. As the acquisition of such knowledge is related to individual persons, it is apparent that such penalty under Rule 26 ibid is applicable on individual persons and not on legal person. Even for argument sake, if it is considered that the word 'person' includes both natural and legal person, and such legal person could acquire knowledge through its individual personnel employed by it, in the present case, I find that there is no such finding by the learned Commissioner that the company had acquired such knowledge of non-payment of central excise duty and thereby the liability to confiscation arose in that case. Rather, I find that the facts of the case are opposite, as the purchase order placed by the appellants with the manufacturer-M/s KRCD (India) Pvt. Ltd., specifically stated that the prices contracted for supply are inclusive of Excise duty by mentioning condition No.4 of the Terms and Conditions as: "*Taxes – Inclusive of all Excise and any other levies/cesses applicable*". Thus, on the basis of the facts of the present case, I do not find it appropriate to impose penalty under Rule 26 ibid on the appellants.

8.2 Further, in the present case, the appellants are not the person, who are issuing excisable invoices for the CDs/DVDs. The only allegation on the appellants is that they did not verify the payment of excise duty in the invoice. It is seen from the contract entered with M/s M/s KRCD (India) Pvt. Ltd., that the price is inclusive of all excise duty and other taxes. Inasmuch as the appellants have specifically indicated in contract that the price is inclusive of excise duty, there does not appear to be any ground for the appellants to believe that the DVDs or CDs have been supplied without payment of excise duty. Thus, on the above basis also, the imposition of penalty under Rule 26 is not sustainable.

9.1 In this regard, I find that the issue is no more in dispute as in a number of orders, the Tribunal has held that penalty under Rule 26 can be imposed only on individuals and not on company. I find that in the case of *Kakateeya Fabs (P) Ltd. (supra),* the Tribunal has held that that penalty under Rule 26 cannot be imposed on company firm or organization. The relevant paragraph is reproduced as under: -

> *"15. The second appellant has contested the imposition of penalty under Rule 26 of CE Rules, 2002. We have perused the findings of the original authority. First of all, we note that the second appellant is a limited company. In various decisions, the Tribunal has held that penalty under Rule 26 can be imposed only on individuals and not on companies. Even otherwise, we note that the original order did not bring out the existence of required ingredients attracting the provisions of the said rule. The original authority recorded that the second appellant did not contest the case. We note that the order has been passed ex parte and the appellant had claimed that due opportunity has not been provided to them to defend their case. In fact they claimed that they have filed reply to the SCN 24-12-2011 which was not considered. The original authority is required to decide the case of penalty, afresh."*

9.2 The Tribunal has also held in the case of Zapak Digital Entertainment Ltd. (supra) that penalty under Rule 26 can be imposed only on individuals. The relevant paragraphs of the said order of the Tribunal are reproduced as under: -

> *"2. It is the contention of the Learned Counsel for the appellant that provision for imposition of penalty under rule 26 of Central Excise Rules, 2002 could not have been invoked against artificial persons for which reliance was placed on the decision of the Larger Bench of the Tribunal in Steel Tubes of India Ltd v. Commissioner of Central Excise, Indore [2007 (217) ELT 506 (Tri.-LB)]. It is also submitted that the very same issue had been agitated in several disputes in the past with stand of the Tribunal remaining unchanged. Reliance was placed on the decision of the Tribunal in Apple Sponge and Power Ltd v. Commissioner of Service Tax, Audit-I [2018 (362) ELT 894 (Tri.-Mumbai)] and in Kakateeya Fabs (P) Ltd v. Commissioner of Central Excise, Bhopal [2018 (15) GSTL 350 (Tri.- Del.)].*

3. In view of the decision of the Larger Bench of the Tribunal on the inapplicability of Rule 209A of Central Excise Rules, 1944 wherein it has been held that

> *'9. As regards the second issue in reference it can be noticed that the Rule 209A pre-supposes a knowledge as to the liability of the confiscation of the goods which being transported etc. It was argued extensively by the authorized representative for the department that the expression "Any person" would include any company or association or body of individual, whether incorporated or not. Reliance was also placed on the definition of the word person in Section 3(42) of The General Clauses Act, 1897, for this proposition. Undoubtedly the expression "Any person" would include a natural and unnatural person i.e. it would include in its ambit any company or corporation or body of individual/s. The moot question is that whether such unnatural body corporate has its own mind, to have knowledge that the goods are liable for confiscation. It is common knowledge that a corporation/company is run by a Board of Directors, who are individuals. They are the trustees of the shareholders of the corporation/company. The decisions taken by the Board of Directors would be for the company but it will not be a decision of the corporation/company. In a given situation, if the Board of Directors decide between themselves, and pass a resolution to engage in the act of evasion of the duty on excisable goods it would be an act of individuals who did so for their personal gain. The corporation/company, stands to no gain out of misdemeanors of the individuals i.e. Board of Directors. In the eyes of law, the corporate entity being a person would be held responsible for the act of the natural persons. But in order to punish the guilty individuals, the veil of corporate entity had to be lifted to understand the correct 4 E/1660/2012 picture. Precisely for these reasons only the provisions of Rule 209A came in to statute, in order to punish the guilty acting behind the veil of corporation/company. If in a given situation a parcel booking clerk of the Indian Railways, in order to have some personal gain, colludes with others to book the goods without any duty paying documents (though he has knowledge that the goods have to be booked on the basis of duty paying documents) and the goods are seized by the authorities at the destination point, can the Indian Railways be penalized under the provisions of Rule 209A of the Central Excise Rules, 1944? The resounding answer would be "NO" as Indian Railways is not having any knowledge that the goods so booked are liable for confiscation. The booking clerk is in knowledge and hence he is liable to be penalized under the said Rule 209A. Accordingly, we find that the conclusion reached by the Tribunal in the case of Indian Roadways Corporation Ltd. (supra) is also correct and does not require any reconsideration.'*

and which is identical to rule 26 of Central Excise Rules, 2002 now invoked on the present appellant, the penalty imposed on the appellant in the impugned order is set aside and appeal allowed."

9.3 In one another case of Apple Sponge and Power Ltd. (supra), the Tribunal had held that penalty under Rule 26 ibid is not imposable on artificial person. Relevant paragraph of order of the Tribunal in the case of is reproduced as under: -

"On plain reading of Rule 26, it is observed that this penalty can be imposed in two situations. Under sub-rule (1), the penalty is imposable on the person who deals with the goods which is liable for confiscation. In the present case, it is the case of the department that the appellant has not received the input. Therefore, there is no question of dealing with the goods. Accordingly, penalty under sub-rule (1) of Rule 26 is not applicable. As regards sub-rule (2), the said

> *sub-rule is applicable on the person who issues the invoice without supplying the inputs for fraudulent passing on the cenvat credit. Penalty under sub-rule (2) is imposable only on the person who issues the invoice. The appellant does not fall under the category of the person mentioned in sub-rule (2). The invoice was issued by M/s. Ambe Vaishno Steels Pvt. Ltd. Therefore, if at all penalty is imposable, it is on M/s. Ambe Vaishno Steels Pvt. Ltd. and not on the appellant. I also find that penalty under Rule 26 can be imposed only on the natural individual person and not on the artificial person or company because the goods is handled by natural living person and not by an artificial entity. Therefore, on both the counts, penalty under Rule 26 is not imposable."*

10. In view of the above analysis and findings and based on the decisions of the Tribunal in the cases referred above, I find that the impugned order to the extent it has imposed penalty under Rule 26 of Central Excise Rules, 2002, on the appellants is not legally sustainable.

11. In the result, by setting aside the impugned order to the limited extent as above, the appeal is allowed in favour of the appellants.

(Order pronounced in open court on 17.05.2024)

(M.M. Parthiban)
Member (Technical)

Sinha