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(2023) 10 CESTAT CK 0025

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Excise Appeal No. 1653, 1856 Of 2011

M/S Allied Poles (India) Ltd. Sushil Jain, Authorized Person — APPELLANT

Vs

Commissioner Of Central Excise, Gurgoan — RESPONDENT

Date of Decision : 11-10-2023

Acts Referred:

Cenvat Credit Rules, 2004 — Rule 14
Central Excise Rules 2002 — Rule 12, 13, 26
Central Excise Act, 1944 — Section 9D, 11A(1), 11AB, 11AC, 14

Citation : (2023) 10 CESTAT CK 0025

Hon'ble Judges : S. S. Garg, Member (J)

Bench : Single Bench

Advocate : Vrinda Bagaria, Nikhil Kumar Singh

Final Decision : Allowed

Judgement

S. S. Garg, Member (J)

1. These two appeals are directed against the common impugned order dated 29.03.2011 passed by the Commissioner of Central Excise (Appeals) whereby the Ld. Commissioner has confirmed the demand of Cenvat Credit amounting to Rs. 14,47,390/- under Rule 12 of Central Excise Rules 2002, Rule 14 of Cenvat Credit Rules 2004 read with proviso to Section 11A(1) of Central Excise Act, 1944 along with interest under Section 11AB of the Act and also imposed penalty on appellant no. 1 of Rs. 1 lakh under Rule 13 of Central Excise Rules 2002 and also imposed penalty of Rs. 25,000/- on appellant no. 2 i.e. Sushil Jain under Rule 26 of the Central Excise Rules, 2002 & 2004.

2. Briefly the facts of the present case are the appellants are engaged in manufacture of Steel Tubes falling under chapter 73, of the 1st Schedule to Central Excise Tariff Act, 1985 and they are availing Cenvat Credit in respect of duty paid on the inputs used in the manufacture of finished goods as envisaged under Cenvat Credit Rules, 2004.

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3. During the investigation, certain cenvatable invoices were recovered from the appellant's premises. These invoices were received by the appellants from M/s Steel Mongers. In the said invoices, manufacturer of goods were shown as M/s Khemka Ispat Ltd., Faridabad and M/s Pasondia Steel Profiles, Ghaziabad through M/s Ayushi Steel, Faridabad (1st stage dealer in this case) during the period 2003-2004 and 2004-2005. Sh KR Khemka, Director of M/s Khemka Ispat Ltd. Faridabad; Sh. Yashpal Sharma, DGM of M/s Pasondia Steel Profiles Ltd., Ghaziabad in their statements admitted that no material was manufactured and dispatched to the appellant. Moreover, Sh. Rupesh Bansal, Director of M/s Ayushi Steel Co., Faridabad has also admitted that he received only invoices from M/s Khemka Ispat Ltd. Faridabad and M/s Pasondia Steel Profiles Ltd., Ghaziabad.

4. On these allegations a show cause notice was issued to the appellant. The appellant submitted their reply to the show cause notice along with following evidences:

(i) Goods Receipt (GRs) issued by the transporter to show that the goods were transported.

(ii) Copy of Daily Stock Account and RG23C part I to show record of receipt of inputs;

(iii) The copy of bank statements reflecting the transactions between the appellant and steel mongers.

5. After following the due process, adjudicating authority vide its order dated 25.03.2010 confirmed the demand along with penalty. Aggrieved by the said order, the appellant filed the appeal before the Commissioner (Appeals) who vide his order dated 29.03.2011 ("impugned Order") upheld the Order-in-Original.

6. Heard both the parties and perused the record.

7. Ld. Counsel Ms. Vrinda Bagaria, appearing for the appellant submitted that the impugned orders are not sustainable in law as the same has been passed without properly considering the evidence on record and the various decisions relied upon the appellant and cited before the Commissioner (Appeals).

8. She further submitted that the Commissioner (Appeals) has not considered the statements made by Sh. K.P. Khemka and Rupesh Bansal and Yashpal Sharma in its true perspectives. She further submitted that the appellant has given sufficient evidence in the form of goods receipt issued by the transporter to show the delivery of the goods, Daily Stock Account and RG-23C Part I and the copy of bank statement reflecting the transactions between appellant and Steel Mongers showing payment through the banking channels.

9. She further submitted that appellant was denied the opportunity of cross examination despite specific request made by them. She further submits that on the contrary, the Ld. Commissioner (Appeals) has observed that it is not necessary that on each and every stage, the adjudicating authority has to allow

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the cross examination of witnesses. She submits that this observation of the Ld. Commissioner (Appeals) is in contravention of Section 9D of Central Excise Act which mandates that specific procedure has to be followed before a statement can be relied upon as evidence. In support of this submission, she relied upon the following decisions:

(i) G-Tech Industries V. Union of India [2016 (339) ELT 209 (P&H)];

(ii) Jindal Drugs Pvt. Ltd. V. Union of India [2016 (340) ELT 67 (P&H)];

(iii) J&K Cigarettes Ltd. V. Collector of Central Excise [2009 (242) ELT 189 (Del.)]

(iv) Meenakshi Ferro Ingots Pvt. Ltd. v. Commissioner of C.Ex., Pune-III [2016 (344) ELT 1085 (Tri.-Mum)];.

10. She further submits that the demand has been confirmed on the basis that there is no movement of goods from Khemka Ispat to Ayushi Steel. She also submits that the impugned order has merely relied upon the general statements taken in the context of other transactions which have no relation to the procurement of goods by the appellant from Steel mongers. She further submits that Ld. Commissioner has not recorded any finding on the evidence produced by the appellant to prove delivery of the goods. Further, the department has not been able to give any additional or independent evidence to prove the allegation of non-receipt of goods against the appellant.

11. She also submits that in the statement dated 09.02.2009, Shri Sushil jain, the authorized representative of the appellant has categorically stated that the disputed goods were received by them in the premises but the Commissioner (Appeals) has not paid any heed to the statement of Shri Sushil Jain and Shri Suresh Sharma, the authorized representative of the transporter. In support of this submission she relied upon the following decisions:

(i) Commissioner of Central Excise, Delhi-III Vs. Bharat Metal Inds. [2017 (346) ELT 308 (Tri.-Chand.)];

(ii) Rinox Engg. Vs. Commissioner of Central Excise, Chandigarh [2014 (304) ELT 436 (Tri.-Del)];

(iii) Commr. Of Central Ex., Chandigarh V. Shakti Roll Cold Strips Pvt. Ltd. [2008 (229) ELT 661 (P&H) maintained by Supreme Court in [2009 (242) ELT A83 (S.C.)]

12. She also submits that the appellant has regularly filed the statutory returns on monthly basis and the fact of clearance of finished goods and availment of credit was duly reflected in the returns and therefore, no penalty is impossible under Section 11AC of the Act read with Rule 13 of CCR, 2002, in absence of any intention to evade payment of duty. She also submits that no penalty in the facts and the circumstances of the case can be imposed on Shri Sushil Jain under Rule 26 of the Central Excise Rules.

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13. On the other hand, Ld. DR reiterated the findings of the impugned order.

14. After considering the submissions of both the parties and perusal of the material on record and the decisions relied upon by the appellant I find that in the first instance the impugned order is bad in law because the whole case was built only on the statement of Mr. K.P. Khemka and Mr. Rupesh Bansal and Mr. Yashpal Sharma and no opportunity of cross examination was provided to the appellant despite specific request.

15. It is settled law in view of the decisions of Punjab and Haryana High Court in the case of Jindal Drugs Pvt. Ltd. V. Union of India [2016 (340) ELT 67 (P&H)] and G-Tech Industries V. Union of India [2016 (339) ELT 209 (P&H)]; cited (Supra) wherein it has been held in para 25 as under :

“25. In the light of the above, respondent no. 2 is directed to adjudicate the show cause notice issued to the writ petitioners by following the procedure contemplated by Section 9D of the Act and the law laid down by various judicial authorities in this regard, including the principles of natural justice, in the following manner:

(i) In the event that the Revenue intends to rely on any of the statements, recorded under Section 14 of the Act and referred to in the show cause notices issued to Ambika and Jay Ambey, it would be incumbent on the Revenue to apply to Respondent No. 2 to summon the makers of the said statements, so that the Revenue would examine them in chief, before the adjudicating authority, Le, before Respondent No. 2.

(ii) A copy of the said record of examination-in-chief, by the Revenue, of the makers of any of the statements on which the Revenue chooses to rely, would have to be made available to the assessee, i.e., to Ambika and Jay Ambey in this case.

(iii) Statements recorded during investigation, under Section 14 of the Act, whose makers are not examined-in-chief before the adjudicating authority, i.e, before Respondent No. 2, would have to be eschewed from evidence, and it would not be permissible for Respondent No. 2 to rely on the said evidence while adjudicating the matter. Neither, needless to say, would be open to the Revenue to rely on the said statements to support the case sought to be made out in the show cause notice.

(iv) Once examination-in-chief, of the makers of the statements, on whom the Revenue seeks to rely in adjudication proceedings, takes place, and a copy thereof is made available to the assessee, it would be open to the assessee to seek permission to cross-examine the persons who have made the said statements should it choose to do so. In case any such request is made by the assessee, it would be incumbent on the adjudicating authority, Le., on Respondent No 2 to allow the said request, as it is trite and well-settled position in law that statements recorded behind the back of an assessee cannot be relied

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upon, in adjudication proceedings, without allowing the assessee an opportunity to test the said evidence by cross-examining the makers of the said statements. If at all authority is required for this proposition reference may be made to the decisions of the Hon'ble Supreme Court in Arya Abhushan Bhandar v. UOI, 2002 (143) ELT:25 (S.C.) and Swadeshi Polytex v. Collector 2000 (122) ELT 641 (S.C.)

16. Further, I find that the Ld. Commissioner (Appeals) has not considered the evidence namely RG-23C part I and the bank statements showing payment to transporter and the supplier. Further, department has not been able to bring any independent evidence to prove the allegations of non-receipt of goods against the appellant. Besides this, statement of Shri Sushil Jain dated 09.02.2009 and Shri Suresh Sharma, the authorized representative of the transporter has been rejected without any basis. Further, I find that in the case of Nidhi Metal Auto Components Pvt. Ltd. v. Comm. Of C.Ex., Delhi-IV (2016 (343) ELT 576 (Tr-Del)] and S.K. Foils Ltd. v. Commissioner of Central Excise, Rohtak where the manufacturer and first stage dealer were same, relief was granted to the assessee on the observation that allegation had been made on basis of statement of manufacturer, dealer/ supplier of invoice and there is no discrepancy in the invoice and payment has been made through cheque.

17. Further, I find that the appellant has regularly filed the statutory returns on monthly basis and the fact of clearance of goods and availment of credit was duly reflected in the returns but the same has not been examined by the authorities below.

18. In view of the facts and circumstances and the evidence on record cited (Supra) I am of the considered opinion that the impugned order is not sustainable in law and therefore set aside the same by allowing both the appeals.

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