
(2023) 08 CESTAT CK 0007

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Excise Appeal No. 10291, 10398, 10399 Of 2013

?Qumruzzama Khan And Others

APPELLANT

Vs

C.C.E. & S.T.-Vapi

RESPONDENT

Date of Decision : 02-08-2023

Acts Referred:

Central Excise Rules, 2002 — Rule 26, 26(2)(ii)

Citation : (2023) 08 CESTAT CK 0007

Hon'ble Judges : Ramesh Nair, Member (J); C.L. Mahar, Member (T)

Bench : Division Bench

Advocate : Parth Mullick, P. K. Singh

Final Decision : Allowed

Judgement

Ramesh Nair, J

1. The brief facts of the cases are that in respect of all the appellants a penalty under Rule 26 was imposed in connection with the case against M/s Nitin Alloys Global Ltd. on which there is a charge that M/s. Nitin Alloys Global Ltd has taken the credit without receipt of the goods. The charge against the present appellant are that they have facilitated for availing a fraudulent Cenvat credit to M/s Nitin Alloys Global Ltd, in their capacity of transporter, CHA, High Seas Seller. The penalty was imposed under Rule 26(2)(ii) of Central Excise Rules, 2002.

2. Shri Parth Mullick, Learned counsel, appearing on the behalf of the appellants at the outset submits that admittedly the penalty was imposed under rule 26(2) (ii) of Central Excise Rules, 2002, which came into effect only on 01.04.2007, whereas the period in the present case is 2005-06. Therefore, the penalty is not sustainable on this ground alone as the Rule 26(2)(ii) cannot be applied retrospectively.

2.1 He alternatively submits that Act of none of the appellant are covered even under un-amended Rule 26. Therefore, on this ground also penalty is not sustainable. He placed reliance on the following judgments:

- Commissioner of Central Excise, Coimbatore vs Elgi Equipments Ltd, 2001 (128) ELT 52(SC)
- Final Order No A/10839/2019 dated 25.04.2019 of the Hon'ble CESTAT, Ahmedabad in the case of Rajesh Kumar Narula vs CCE & ST, Vadodara
- Commissioner of Central Excise, Chandigarh-I vs Mini Steel Traders, 2014 (309) ELT 404 (P&H)
- Commissioner of Central Excise vs Rajesh Kumar Rajendra Kumar & Co, 2015 (325) ELT 506 (Bom)

3. Shri P.K. Singh, Learned Superintendent (AR) appearing on behalf of the revenue reiterates the findings of the impugned order.

4. We have carefully considered the submission made by both the sides and perused the record. We find that even though in the operating portion of the order, the penalty was imposed under Rule 26, but in the concluding finding in respect of all the appellants, it is clearly stated that they are liable for penalty under rule 26(2)(ii) of Central Excise Rules, 2002. Therefore, there is no doubt that the penalty was imposed under Rule 26(2)(ii) of Central Excise Rules, 2002.

4.1 In the present case the period involved is 2005-06 Rule 26(2)(ii) was inserted vide Notification No.8/2007-CE(NT) dated 01.03.2007 (effective from 01.04.2007), therefore, the provision of Rule 26(2)(ii) cannot be made applicable retrospectively for the period prior to 01.04.2007. For this reason alone the penalties imposed on the appellants are not sustainable.

4.2 Without prejudice to the above finding we also find that even if it is assumed that the penalty is imposed under Rule 26, the same Rule is reproduce below:

"Rule 26. 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."

4.3 From the reading of the above Rule, it can be seen that a person can be penalized under this rule, only if he is involved in various activities of handling of goods, which are liable for confiscation. In the present case the entire case of the department is that there is no movement of goods but it is a paper transaction and the M/s Nitin Global Ltd, who has taken Cenvat credit, has not received the goods. When this is the case of the department as no goods is involved, consequently, none of the appellants are engaged in handling the goods which is liable for confiscation.

4.4 As regard the appellant, Shri Rakesh Kumar Gupta, who is the director of the

importer company, they have sold the goods on the high sea sale basis, therefore, they are not involved in facilitating the fraudulent Cenvat credit to M/s Nitin Alloys India Ltd and even he cannot be implicated as he is not involved in any goods which is liable for confiscation. As regard the Delight Cargo Carries, they are the transporter and as per the charge of the department they have not transported the goods. Even for this reason also when the transporter has not handled the goods, there is no goods liable for confiscation.

4.5 As regard the appellant Qumaruzzama Khan, he is the owner of the CHA Agency, whose job is only to clear the customs goods and for this role it cannot be said that the appellant is involved in any fraudulent passing of the Cenvat credit. On the various counts as discussed above the appellant are not liable for penalty under Rule 26 of Central Excise Rules, 2002.

5. Accordingly the penalties are set aside and appeals are allowed.