

REPORTABLE

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
CEAC 6/2010 & CM Nos.12621-22/2010

% *Date of Decision: 21st July, 2010.*

AVI STEEL TRADERS Appellant

Through: Ms. Shikha Sapra and
Mr. Piyush Kumar, Advocates

VERSUS

COMMISSIONER OF CENTRAL EXCISE Respondent

Through: Mr. Mukesh Anand with
Mr. Shailesh Tiwari and Mr.
Mohit Yadava, Advocates.

CORAM :-

HON'BLE MR. JUSTICE A.K. SIKRI
HON'BLE MR. JUSTICE REVA KHETRAPAL

1. Whether Reporters of Local newspapers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?

A.K. SIKRI, J. (Oral)

1. Short question raised in this appeal is as to whether the Department was correct to impose penalty under Rule 25 of the Central Excise Rules, 2002 (hereinafter referred to as 'the Rules') when this provision was not cited in the show cause notice.
2. In nutshell, we may point out that in the show cause notice, *inter alia*, allegation against the appellant herein was that the appellant had removed excisable goods in contravention of the provisions of Excise Act and Rules and particularly Rule 11 of the Central Excise Rules, sub-section (1) which reads as under:

“Rule 11. Good to be removed on invoice. – (1) No excisable goods shall be removed from a factory or a warehouse except under an invoice signed by the owner of the factory or his authorized agent and in the case of cigarettes, each such invoice shall also be countersigned by the Inspector of Central Excise or the Superintendent of Central Excise before the cigarettes are removed from the factory.”

3. It was specifically alleged that the appellant had contravened the provisions of Rule 11 of the Rules as well as Rule 3, 4 and 7 of Cenvat Rules, 2002. On that basis, the appellant was called upon to show cause as to why:

- (a) Penalty should not be imposed upon M/s. AVI Steel Traders under Rule 13 of Cenvat Credit Rules, 2002 read with Section 11AC and 38A of the Central Excise Act, 1944 for aforesaid contravention.
- (b) The amount of Cenvat credit of Rs.3,92,449/- lying unutilized in RG-23D register should not be lapsed.

4. The appellant submitted reply to this show cause notice. The appellant was also given hearing through its authorized representative. Thereafter, order was passed by the Assistant Commissioner, Central Excise on 20.09.2006. Operative portion whereof reads as under:

“Order

- (a) that the Cenvat credit of Rs.3,92,449/- (Rupees Three lakhs ninety two thousand four hundred and forty nine only) lying in the Dealer’s account shall be expunged from his records; and
- (b) that there shall be a penalty of Rs.1,00,000/- (Rupees one lakh only) on AVI Steel Traders, Plot No.41-46, Hardware Chowk, Faridabad, under Rule 25 of the Central Excise rules, 2002; and
- (c) that there shall be another penalty of Rs.1,00,000/-(Rupees one lakh only) on AVI Steel Traders, Plot No.41-46, Hardware Chowk, Faridabad, under Rule 13(1) of the Cenvat Credit Rules, 2002.””

5. It is, thus, clear that Cenvat credit lying in the account of the appellant was expunged from the records and the penalty of Rs.1,00,000/- was imposed under Rule 25 of the Rules as well as penalty of Rs. 1,00,000/-was imposed under Rule 13(1) of the Cenvat Credit Rules, 2002.
6. In the instant appeal, we are concerned in this appeal only with the imposition of penalty under Rule 25 of the Rules. The appellant challenged this penalty by filing the appeal before the Commissioner (Appeals) raising the contention that as Rule 25 of the Rules was not invoked in the show cause notice no penalty could be imposed under this provision. This contention was rejected by the Commissioner (A) in the following terms:

“6. So far as imposition of penalty of Rs.1,00,000/- under Rule 25 of the Central Excise Rules, 2002 is concerned, there is no doubt that the appellants had contravened the provisions of Central Excise Law and had rendered themselves liable to penal action. The show cause notice specifically allege that the appellants had contravened the provisions of Rule 11 of the Central Excise Rules, 2002 and the Adjudicating Authority in para 9.6 of the impugned Order-in-Original has also held that the appellants had violated the provisions of Rule 11 of the Rules *ibid* with an ulterior motive of passing on the Cenvat credit in respect of the entire quantity of 132.395 MTs of goods, found short. Though I agree that in the show cause notice, rule 25 of the Rules *ibid* has not been specifically invoked, but the show cause clearly mentioned the allegation and charges against the appellants under Central Excise Rules, 2002. The Adjudicating Authority in para 909 of the Order-in-Original has rightly held that non-mentioning or wrong mentioning of a rule, will not vitiate the present proceedings in view of the case laws discussed therein. Besides, there are number of judgments where the various Hon’ble courts have held that *non-mentioning or mere wrong mention of provisions of law in the show cause notice, does not vitiate the proceedings if the allegations and charges against the assessee (appellants) are mentioned in clear terms in the show cause notice*. In this regard, the Hon’ble CESTAT in the case of Commissioner of Central Excise, Chandigarh vs. Dabur India Ltd. 2004 (178) ELT 819 (Tri. Delh) has held that “Mere wrong mention of provisions of law did not vitiate show cause notice when all allegations are contained in the show cause notice.” Further the Hon’ble CESTAT in the case of Standard Industries Ltd. vs. Commissioner of C. Ex. Mumbai-2003 (158) ELT 623 has held that “non mention of Rule in show cause notice not fatal if the facts

lead to understanding of the same". Similar views were taken by the Hon'ble Supreme Court in the case of Fortune Impex Vs. Commissioner – 2004 (167) ELT A 134 (SC), wherein the Hon'ble Apex Court has held that "non-mentioning of particular Section of Customs Act 1962 would not vitiate the proceedings when allegations and charges against all the appellants were mentioned in clear terms in the show cause notice." Therefore, in view of the above settled proposition of law, the non mentioning of the provisions of law in the impugned show cause notice, had not vitiated the present proceedings and the Adjudicating Authority has rightly held the appellants liable to penal action under Rule 25 of the Central Excise Rules, 2002. It will not be out of place to mention here that in respect of Invoices Nos. 1 to 10 issued by the appellants during the period 22.4.2002 to 14.5.2002, the investigations made by the Central Excise Authorities at the appellants' end, had revealed that in number of cases the appellants had made only paper transaction just to pass on the Cenvat credit to the buyers without actually supplying the goods physically. For example, the investigations in respect of Invoice No.6 dated 30.4.2002 had revealed that the vehicle No. HNU-1813 mentioned on the said invoice, was found to be a Moped, on which the appellants had shown to carry a load of 13 tonnes of excisable goods. Similarly the vehicle No. HR-37A-3694 mentioned in invoice No.4 dated 29.4.2002 was found a HTV Bus as reported by the Transport office, Ambala and the owner of the bus in his statement dated 11.2.2004 had denied of ever having used his bus for transporting the goods from the appellants' premises to the buyers' premises at Rohtak. Though investigation in respect of the invoices issued by the appellants as mentioned in the Order-in-Original, are not the part of the present proceedings as the Central Excise authorities had not concluded the said investigations at their logic end in as much as the investigations on the part of the buyers' end, were never carried out, but the above modus operandi adopted by the appellants unequivocally, leaves no doubt that the appellants had indulged themselves only in paper transactions with the ulterior motive to pass on the Cenvat credit to the buyers without selling/delivering the excisable goods with the alleged invoices. Therefore, I do not see any reason to interfere with the Order-in-Original so far as the imposition of penalty under Rule 25 of the Rules, is concerned and to that extent, I uphold the Order-in-Original."

7. Not satisfied with the aforesaid decision, the appellant moved to Customs, Excise and Service Tax Appellate Tribunal (hereinafter referred to as 'the Tribunal'). The Tribunal affirmed the order of the Commissioner (Appeal) and giving the same reasoning and rejected the contention of the appellant in the following manner:

"6. I have carefully gone through the submissions from both sides and perused the record. As a registered dealer, their obligation to account for the duty paid goods received by them and in respect of which they are entitled to pass on credit is well settled. Accounting does not merely mean accounting in RG-23D but accounting the disposal of the goods as specifically permitted under the Rules. It is strange that while the applicant's record showed such huge quantity of more than 1.3 lakhs kgs. Of inputs, yet no trace of such inputs were found on the date of visit of the officers. One of the explanations offered for the shortage of the

inputs was that the goods were sold without bills which a dealer is allowed registration. The provision of Rule 11 of the Central Excise Rules relating to issue of invoice is clearly applicable in terms of Rule 11(7) to the first stage dealer as well as second stage dealer. The failure of the appellant in not issuing invoices for goods sold by them clearly stands admitted. The ingredient of the offence clearly stands disclosed in the show cause notice and subsequently in the orders of the lower authorities. Mere non-mention of the Rule or non-mention of sub-rule cannot act as a prejudice as long as the nature of violation has been disclosed to the assessee. Under these circumstances, the submission of the learned Consultant that Rule 25 has not been invoked in the show cause notice and therefore, no penalty can be imposed does not merit acceptance. The decision of the Hon'ble Supreme Court in *Amrit Foods* does not apply to the facts of the present case. Similarly, the decision on the case of *M.H. Steel Corpn., Ashish Gupta* cited supra are of no help to them as the facts of the present case are clearly different from the facts of those cases. It is a clear case of registered dealer admittedly failing in their obligation in accounting the goods received by them. As already observed, accounting does not merely mean accounting in RG-23D but accounting the disposal of the goods as permitted under the Rules. As there is a clear violation on the part of the noticed that stock as per book was 1,32,395 kgs. Of various inputs like alloy steel ingots, alloy steel bars, rods, SS flats but no stock whatsoever was available. The appellants claimed that parts of the goods have been stolen but admitted that no complaint was filed in connection with the alleged theft with the police. They further admitted that the rest of the goods have been sold without bills in the grey market on receipt of cash. The credit of Rs.3,92,449/- attributable to the above inputs was lying intact and was not passed on. In pursuance of the show cause notice issued, the original authority imposed a penalty of Rs.1 lakh under Rule 25 of Central Excise Rules, 2002 and Rs.1 lakh under Rule 13(1) of Cenvat Credit Rules, 2002. On appeal, the Commissioner (Appeals) partly allowed the appeal by setting aside the penalty imposed under Rule 13 of erstwhile Cenvat Credit Rules, 2002 while upholding the penalty imposed under Rule 25 of the Central Excise Rules, 2002."

8. Contention of the learned counsel for the appellant remains the same before us as contended before the authorities below. In support of her contention, learned counsel referred to the judgment of the Supreme Court in the case of ***Amrit Foods Vs. C.C.E., U.P*** [2005 (190) ELT 433 (SC)], which was set aside on the ground that neither the show-cause notice nor the order of the Commissioner specified as to which particular clause of Rule 173-Q had been allegedly contravened by the appellant. It was observed that before imposing the penalty, it was necessary for the assessee to be put on notice as to the exact nature of contravention for which the assessee was liable under the

provisions of Rule 173-Q (which is *pare materia* of Rule 25 of Central Excise Rules, 2002.

9. There cannot be any dispute about the aforesaid legal position stated by the Supreme Court in the aforesaid judgment. However, in the present case, the appellant was specifically put on notice about the exact nature of contravention, i.e., Rule 11 of the Central Excise Rules, 2002. It is reiterated that no excisable goods shall be removed from a factory or a warehouse except under an invoice signed by the owner of the factory or his authorized agent. It is the contravention of this Rule for which penalty is provided under Clause (a) sub-Rule (1) of Rule 25 of the Rules, which reads as under:

“Rule 25. Confiscation and penalty. – (1) Subject to the provisions of Section 11 AC of the Act, if any producer, manufacture, registered person of a warehouse or a registered dealer, -

- (a) Removes any excisable goods in contravention of any of the provisions of these rules or the notifications issued under these rules; or”

10. It is in this context, we have to examine the matter. In the show cause notice, as pointed above, not only the allegations are made in detail as to how the appellant removed the goods from its factory without invoice but it is also specifically mentioned that by the aforesaid act, the appellant had contravened the provisions of Rule 11 of the Rules. Thus, the appellant was put on clear notice as to what kind of violation it had made. The penalty is a consequence thereof and, therefore, non-mentioning of Rule 25 of the Rules was mere inadvertent omission.

11. In these circumstances, judgment of the Apex Court in **Amrit Foods** (supra) would not be applicable in the instant case. We may also observe at this stage that the requirement of putting the assessee on notice about the exact nature of contravention, i.e., Rule 11 of the Central Excise Rules, 2002 is to make sure that that the noticee be in a position where he can give an effective reply. The purpose is to adhere to the principles of natural justice before taking any action. Since the appellant in the instant case was communicated in no uncertain terms, the allegations against him on the basis of which contravention of Rule 11 of the Rules was lodged in the show cause notice, proper opportunity was given to him to reply. Therefore, no prejudice can be said to be caused to the appellant thereby.

12. We, therefore, are in conformity with the view taken by the authorities below.

(A.K. SIKRI)
JUDGE

(REVA KHETRAPAL)
JUDGE

JULY 21, 2010.
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