IN THE HIGH COURT OF PUNJAB AND HARYANAAT CHANDIGARH

CEA No. 86 of 2010 (O&M)
Date of Decision: 10.2.2015

M/s P.P. Oxide ..... Appellant

Versus

Commissioner of Central Excise, Faridabad .... Respondent

CORAM: HON'BLE MR. JUSTICE RAJIVE BHALLA
HON'BLE MR. JUSTICE B.S. WALIA

Present: Sh. Deepak Gupta, Advocate for the appellant.

Sh. Kamal Sehgal, Advocate for the respondent.

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B.S. WALIA, J.

Vide this appeal under Section 35G of the Central Excise Act, 1944 (hereinafter to be referred to as 'the Act'), the appellant prays for quashing of Final Order No. 1471/2009-SM[BR] dated 08.09.2009 i.e. Annexure A-5, passed by the Customs, Excise and Service Tax Appellate Tribunal, New Delhi (hereinafter to be referred to as 'the CESTAT'), allowing the appeal of the respondent by setting aside the order of the Commissioner (Appeals) and restoring the order of the original authority.

Brief facts of the case, leading to the filing of the instant appeal are that the appellant is a proprietorship concern working at Faridabad, engaged in the manufacturing of Zinc Oxide. Appellant vide Invoice Nos. 51 and 52 both dated 12.07.2000 and Invoice

No. 112 dated 22.08.2000 purchased imported material i.e. Zinc Ingots from M/s R.K. Enterprises (hereinafter to be called as 'dealer') in the month of July-August 2000. The importer at the time of import had paid Additional Custom Duty (CVD) apart from other duties and the appellant could take credit of Additional Custom duty.

The respondent-department initiated an investigation against the dealer alleging that only invoices were being supplied to the buyers and not the material. Statement dated 16.1.2001 of Sh. R.K. Gupta, owner of the dealer was recorded inter alia mentioning that he did not have any godown to store the goods, therefore, he used to deliver the goods to his buyers directly from the manufacturers/dealers/importers and that in case of scrap and other such material where the quantity delivered was more than 6 tons against the invoice through tempo, the transaction was bogus. Sh. R.K. Gupta, appellant, stated that M/s Gupta Metal Sheets Private Limited and M/s Parkash Strips Limited never purchased the material from him and he has given only invoices. Copy of the statement by Sh. R.K. Gupta dated 16.1.2001 is attached alongwith the appeal as Annexure A-2. On the basis of the statement of the dealer, the respondent-department issued a show cause notice dated 30.06.2004 to the appellant denying the Cenvat Credit availed on the basis of above stated three invoices, raising a demand on the basis of the statement of the dealer.

The appellant filed reply contesting the demand and specifically prayed for cross examination of Sh. R.K. Gupta, as well as, drivers of the vehicles. However, the Adjudicating Authority did not concede the request of the appellant for cross examination and held that the appellant had availed credit without actually receiving the goods. On the basis of the proceedings conducted by the Adjudicating Authority, a demand of Rs.3,30,120/- was confirmed in addition to the equal amount of penalty under Rule 173Q of Central Excise Rules, 1944 read with Rule 13 of the Cenvat Credit Rules vide Annexure A-3 i.e. Order-in-Original dated 29.03.2006.

Appeal dated 03.08.2006 filed by the appellant before the Commissioner (Appeal), Central Excise, was allowed vide Order-in-Appeal Annexure A-4 dated 20.03.2007 holding that the Adjudicating Authority had wrongly denied request of the appellant for cross examination and further that the evidence brought on record by the department regarding fraudulent availment of credit was inconclusive and insufficient to prove the same and that the statement of Sh. R.K. Gupta should have been read as a whole.

The revenue preferred an appeal in the year 2007 before the learned CESTAT, assailing the Order-in-Appeal passed by the Commissioner (Appeals), whereupon the CESTAT vide its Final Order Annexure A-5 dated 08.09.2009 allowed the appeal of the revenue by holding that in the present case, admittedly all the consignments were of more than 6 MT, therefore, the Adjudicating Authority had rightly held that the assessee availed credit merely on the basis of invoices. The CESTAT further held that the Division Bench in the case of M/s Garima Enterprises Private Limited had already held that consignments of more than 6 MT were bogus and opportunity of cross examination would not be necessary.

Instant appeal has been filed before this Court on the ground that the appellant had made payment of invoice price by cheque and had manufactured finished goods and paid duly thereon, consequently, it was entitled to credit of 16% of value of the material, especially since it had shown manufacture of finished goods and had further paid duty on the finished goods and that the production having been duly shown in RG-1 register i.e. Annexure A-6 and paid duty on finished goods, there was no question of payment of duty, if no inputs had been received. Secondly, that the Division Bench of CESTAT had allowed the appeal of M/s Garima Enterprises Private Limited i.e. one of the buyers of M/s R.K. Enterprises and while allowing the appeal it had held that the statement of Sh. R.K. Gupta revealed that besides issuing bogus Modvat Invoices, he was also issuing genuine invoices and statement of Sh. R.K. Gupta was very general and nowhere specifically mentioned that the invoices issued in the name of the appellant were bogus. The CESTAT had further held that M/s Garima Enterprises Private Limited never received invoices for more than 6 tons and as such even as per the statement of Sh. R.K. Gupta, supply to M/s Garima Enterprises Private Limited was not bogus and that the CESTAT had wrongly interpreted the decision of the Division Bench in the case of M/s Garima Enterprises Private Limited. In the case of M/s Garima Enterprises Private Limited it was nowhere held that consignments of more than 6 MT were bogus and that the CESTAT in the case of the appellant had wrongly noted that the Division Bench of the CESTAT had wrongly noted that Division Bench of CESTAT had held that consignments of more than 6 MT were bogus and opportunity of cross examination would not be necessary. Since all the statements were recorded behind the back of the appellant, therefore, no statement could be relied upon in the absence of granting opportunity of cross examination. Further plea is that neither Sh. R.K. Gupta had not been confronted with invoices issued to the appellant nor he was specifically asked about the material supplied to the appellant, therefore, on the basis of general statement, demand could not be created nor the penalty imposed. Fourthly, that as per the statement of Sh. R.K. Gupta, scrap and other such material where quantity delivered on invoice through a tempo was more than 6 ton, the transaction was bogus, but the appellant had neither purchased scrap nor material like scrap and had instead purchased Zinc Ingots which were not scrap. The material purchased was imported material and it had suffered excise duty at the time of clearance of goods from port. There was no evidence that duty paid material had been diverted and used by any third party and there was no advantage to the appellant to simply buy the invoice when it had paid duty on finished goods and payment was made through cheque. The appellant had been supplied material in truck Nos. HR 38B 0244, HR 38B 1101 and HRP 7671. No enquiry had been made from the owners / drivers of the aforementioned trucks and the enquiry made from the truck owners related to other buyers and not the appellant and the material supplied to the appellant was supplied in trucks and not tempo, whereas the statement of Sh. R.K. Gupta relates to tempo and not truck, therefore the statement of the owners and drivers of the truck was not relevant to the appellant. Lastly, the CESTAT had not considered all the questions of penalty, as the Adjudicating Authority had imposed penalty equivalent to amount of duty although penalty was imposed under Rule 173Q read with Section 11AC of the Act. It was contended that in the light of the above, it was evident that the appellant had not committed any fraud, therefore, penalty was not warranted in the facts of the instant case.

The following substantial questions of law have been framed in the appeal by the appellant:-

(a) Whether demand can be created on the basis of statement of third party who has not been allowed for cross examination?

(b) Whether the findings of Tribunal are perverse and contrary to the facts and evidences on record?

(c) Whether Tribunal is justified to confirm demand when demand against similar situated buyers has been dropped?

(d) Whether equal amount of penalty is justified when penalty in other cases has been reduced?

On the basis of the proceedings conducted, the Assistant Commissioner , Delhi-III, Gurgaon, passed Order-in-Original dated 29.3.2006 by observing that Noticee No.1 had availed of the inadmissible Cenvat/Modvat Credit of Rs.3,30,120/- collectively against three invoices i.e. 051 dated 12.7.2000, 052 dated 12.7.2000 and 112 dated 22.8.2000 when the goods actually did not accompany the invoices. Noticee No.1, 2 and 3 could not give any probable reason for delay of 8 days and 1 month from the date of despatch from the supplier and reaching of the goods to the factory of Noticee No.1, if at all agreed to, since the goods were claimed to be directly supplied to the Noticee No.1 without being unloaded either at Delhi or Faridabad ; noticee No.2 in his statement dated 16.01.2001 inter alia admitted that where the date of purchase and sale of goods was not the same and where the quantity was over 6 tons, the transactions were purely of invoices and the goods were not accompanied ; that Noticee No.1 in response to the show cause notice dated 30.06.2004 filed interim reply dated 31.01.2006 and inter alia demanded cross examination of the staff concerned with the case stating that none of the statements whether of the transporters or of noticee No.2 had any relation to his case, the demand was time barred, there was no suppression of facts etc. etc. The inputs covered under the captioned three invoices were recorded in the statutory / private records and goods were produced out of those inputs and duly accounted for and sold on payment of duty and Cenvat had been rightly availed of, no interest being chargeable and no penalty was imposable. The Assistant Commissioner further observed that cheques were issued just to pass on the entries and to make transactions as genuine and that equal amount was later on returned in cash and that investigation report received from the Central Excise Faridabad also revealed that none of the transport used in all the three subject invoices were genuine. Contention of Noticee No.1 was that no discrepancy was found in the records of the Noticee, when the team officers visited their premises and the inputs received were duly recorded, goods were got manufactured out of those inputs and sold after duly accounted in the daily stock account did not in any way prove that the inputs were actually transacted and further that the demand for cross examination of Sh. R.K. Gupta, Noticee No.2, the drivers, Central Excise staff etc. was not acceptable on merits, since the charges leveled were based on the corroborated evidences on record and were proved without any doubt, the Modvat / Cenvat credit amounting to Rs.3,30,120/- was also availed by Noticee No.1 against fraudulent / bogus invoices and the same was used by Noticee No.1 for payment of duty on their final products. The said final products were, therefore, cleared without payment of duty as the credit used for payment of the duty was in fact not available to Noticee No.1 and the same was availed of fraudulently. Thus penalty was imposable on Noticee No.1 under Rule 173Q of the erstwhile Central Excise Rules, 1944 read with Section 11A of the Act ibid.

The Commissioner, Central Excise (Appeals), Delhi III, Gurgaon, while hearing the appeal by the appellant against the order of the Assistant Commissioner, set aside the order passed by the Assistant Commissioner by observing that from the statement of Sh. R.K. Gupta, it appeared that he may have indulged in bogus transactions but it was difficult to ascertain as to which of the transactions were genuine and which were bogus and statements of the transporters did not corroborate the statement of Sh. R.K. Gupta in material particulars, with regard to the appellant. Secondly that there were number of statements of the supplier of inputs, who had stated that they physically supplied the inputs to the firms of Sh. R.K. Gupta on payment of duty and said statements were totally at variance with the statement of Sh. R.K. Gupta, who had stated that in the case of bogus transaction, neither the materials were physically received by him nor further sold to its customers. Thirdly, that there was no link or corelation evident from the details of the bank account of M/s Shivalik International and M/s Neelkanth relied upon in the notice, to suggest that there was a flow back of funds from Sh. R.K. Gupta to the appellant and the department had not shown that there had been any flow back of money between M/s R.K. Enterprises and the appellant. Fourthly, that the Adjudicating Authority should have in the facts and circumstances of the case allowed the cross examination as requested by the appellant in view of the fact that the said statements were recorded behind the back of the appellant. The purpose of the cross examination was always to test the correctness of the testimony made by witness at the back of other party and that the evidence brought on record by the department regarding the fraudulent availment of Cenvat credit was inconclusive and insufficient to rove the same and that the statement of Sh. R.K. Gupta should have been read as a whole. The department cannot approbate and reprobate inasmuch as the statement being relied upon must be accepted or rejected by the department as a whole and in respect thereof, reliance was made on the judgment of the CESTAT in the case of Business Combines Ltd. vs. CCE Nashik [2005 (190) ELT 67 (Tri Mum)]. The Commissioner (Appeals) observed that the Adjudicating Authority had in fact disallowed the credit and imposed penalty against the appellant only by drawing inferences and placing reliance on inadmissible and inadequate evidence. Despite the fact that it was settled principle of law that no presumption on the basis of uncorroborated and uncross examined evidence could be drawn in cases of evasion of duty or availment of Modvat/Cenvat credit when the allegation relates to commitment of fraud etc.

Although the appellant has raised a number of points but we are of the view that the matter could be disposed of by remitting the case to the CESTAT to consider the plea of the appellant that the appellant had made the payment of invoice price by cheque and thereafter it had manufactured finished goods and paid duty thereof, as evident from production dely shown in RG-1 Register as also the demand of duty on goods by taking into account the evidence if any to be produced by the appellant in respect there to and in case the appellant succeeds in proving that the payment of price of goods received against invoice had been paid by cheque and that there was no link or corelation even from the details of the bank account of M/s Shivalik International and M/s Neelkanth relied upon in the notice to suggest that there was a flow back of funds from Sh. R.K. Gupta to the appellant or from any other material and further taking into account the record produced / to be produced by the appellant in support of its plea that it had manufactured goods and shown the manufacture of the finished goods as well as the payment of duty on the said finished goods out of the goods purchased against the invoices and shown the same in the RG-1 Register etc in case the CESTAThad not taken into account the aforementioned aspects.

Consequently, we allow the appeal, set aside the order dated 08.09.2009 passed by CESTAT and remit the matter for adjudication afresh. Parties are directed to appear before the CESTAT on 25.02.2015.

(RAJIVE BHALLA) **(B.S. WALIA)**

February 10, 2015 **JUDGE** **JUDGE**

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