

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 13.02.2017

CORAM

THE HONOURABLE MR. JUSTICE HULUVADI G.RAMESH
AND
THE HONOURABLE DR. JUSTICE ANITA SUMANTH

C.M.A. NO. 151 OF 2010

M/s. NGA Steels (P) Ltd.
Pappankadu
Karukkampalayam Village
Morur, Sankari Taluk
Salem District. ... Appellant

- Vs -

1. The Customs, Excise & Service Tax
Appellate Tribunal
South Regional Bench
Shastri Bhavan Annexe
Chennai 600 006.
2. The Commissioner of Central Excise
Anaimeedu, Salem. ... Respondents

Appeal filed against the order dated 23.11.2009 passed by the Customs, Excise & Service Tax Appellate Tribunal, South Regional Bench, Chennai, made in Appeal No.E/511/2008/MAS (Final Order No.1783/09).

For Appellant : Mr. Mr. K.Jayachandran
For Respondents : Mr. S.Rajasekar for R-2

RESERVED ON	02.02.2017
PRONOUNCED ON	13.02.2017

JUDGMENT

HULUVADI G.RAMESH, J.

The present appeal is directed against the order passed by the 1st respondent, viz., Customs, Excise & Service Tax Appellate Tribunal, whereby and whereunder, the Tribunal had modified the order by imposing fine of Rs.2,00,263/=, in lieu of confiscation of the goods.

2. The facts, which has culminated in the filing of this appeal, could be briefly summarised as under :-

An inspection was conducted by the authorities of the 2nd respondent on 26.12.2006 at the factory premises of M/s.Krishna Alloys. At the time of verification, the physical quantity was found to be in variation with the stock and account registers. It was also found that there was removal of a total quantity of 67.475 Mts., of Ingots on two different dates, viz., 24.12.2006 and 26.12.2006, without there being corresponding statutory invoice being raised for the said clearance. Apprehending clandestine removal of the said quantity without proper accounting, the relevant records were seized by the officers of the inspection unit. The statement recorded from the Accounts-in-charge, revealed that due to the non-availability of the Managing Partner, who is the authorised signatory of the invoice, due to urgent requirement of the purchaser, viz., M/s.NGA Steels, the quantity was supplied without the necessary invoices.

3. On 27.12.2006, the officers also visited the factory premises of the appellant factory, wherein on physical verification of the stocks and accounts, excess stock was detected. Explanation in tune with the one offered by M/s.Krishna Steels was offered by the Director of the appellant factory.

4. Since it was evident from the facts on record that both the seller and buyer had contravened the provisions of the Central Excise Rules, 2002, action was sought to be initiated against the said companies. Accordingly, for contravening Rules 25 and 26 of the Central Excise Rules, 2002, i.e., for receipt of M.S. Ingots without the cover of invoices and for not having accounted the said receipt in their accounts, show cause notice was issued on M/s.NGA Steels Pvt. Ltd., to show cause why imposition of duty should not be levied and also as to why penalty should not be imposed under Rule 25 of the Central Excise Rules in addition to demand of interest under Section 11AB of the Central Excise Act. Further the show cause notice also contemplated confiscation of the goods received under Rule 25 of the Central Excise Rules, 2002 in addition to imposition of penalty. Separate show cause notice was also issued on M/s. Sri Krishna Alloys.

5. After receipt of reply from M/s.NGA Steels as well as M/s.Sri Krishna Alloys and after affording an opportunity of personal hearing and on the basis of the written submission filed by the parties to the lis, the assessing officer held that it was a fit case for imposing penalty and, accordingly, the following order was passed :-

"(i) I confirm and demand the duty amount of Rs.2,00,263/- (Rupees Two Lakhs Two Hundred and Sixty Three only) (Cenvat - Rs.1,96,336/- and Edu. Cess Rs.3,927/-) under Section 11A (1) of the Central Excise Act, 1944.

(ii) I demand appropriate interest on the above duty amount under Section 11AB of the Central Excise Act, 1944.

(iii) I confiscate the 67.475 MT of M.S. Ingots

valued at Rs.12,27,100/- seized under a mahazar on 27.12.2006 and deposited for safe custody with M/s.NGA Steels Private Ltd., in terms of Rule 25 of the Central Excise Rules *ibid*. However, in exercise of the power conferred by Section 34 of the Central Excise Act *ibid*, I give M/s.NGA Steels Pvt. Ltd., an option to pay a fine of Rs.3,06,775/- in lieu of confiscation.

(iv) I impose penalty of Rs.2,00,263/- (Rupees Two Lakhs Two Hundred and Sixty Three only) on M/s.Sri Krishna Alloys (P) Ltd., Sankari, under Rule 25 of the Central Excise Rules, 2002.

(v) I impose a penalty of Rs.2,00,263/= (Rupees Two Lakhs Two Hundred and Sixty Three only) on M/s.NGA Steels Private Limited, Morur under Rule 25 of the Central Excise Rules, 2002.

(vi) I impose a penalty of Rs.10,000/- on Shri N.Anbalagan, Managing Partner of M/s.Sri Krishna Alloys, Sankari, in terms of Rule 26 of the Central Excise Rules, *ibid*.

(vii) I impose a penalty of Rs.10,000/- on Shri A.Rajaraman, Director of M/s.NGA Steels Private Ltd., in terms of Rule 26 of the Central Excise Rules *ibid*.

(viii) I impose a penalty of Rs.10,000/- on Shri K.Duraisamy, Account-in-charge of M/s.Sri Krishna Alloys, Sankari, in terms of Rule 26 of the Central Excise Rules, *ibid*."

6. Aggrieved against the said order of the Assessing Officer, viz., Assistant Commissioner of Central Excise, the appellant herein as well as M/s.Sri Krishna Alloys, preferred appeals before the Commissioner of Central Excise. After affording opportunity to the parties, while the Commissioner (Appeals) upheld the order of the Assessing Officer insofar as the demand under Section 11A (1) of the Central Excise Act along with interest on duty under Section 11AB of the Act imposed on M/s. Sri Krishna Alloys, however penalty imposed under Rule 25 of the Central Excise Rules, imposed on M/s.Sri Krishna Alloys, was reduced to Rs.50,066/=. Insofar as the present appellant is concerned, while penalty under Rule 25 of the Central Excise Rules was reduced to Rs.50,066/=:, however confiscation of the goods as ordered under Rule 25 of the Central Excise Rules was upheld, while redemption fine in lieu of confiscation was reduced to Rs.2,00,263/=. Insofar as personal penalty imposed on the individuals under Rule 26 of the Central Excise Rules is concerned, the same was reduced to Rs.2,500/= each.

7. Aggrieved by the said order, the appellant herein preferred appeal before the Tribunal. The Tribunal, after considering the matter in relation to the relevant provisions of law and also the stand of the appellant in the matter, while declined to interfere

with the quantum of redemption fine imposed on the appellant, however, set aside the penalty imposed under Rule 25 of the Central Excise Rules on the ground that the appellant herein does not fall under any of the four categories covered by the said Rule and, therefore, imposition of penalty on the appellant was not justified. Aggrieved against the order of the Tribunal in confirming the redemption fine, while setting aside the penalty imposed under Rule 25 of the Central Excise Rules, the appellant is before this Court with the present appeal.

8. This Court, while admitting the appeal, framed the following substantial questions of law for consideration :-

"i) Whether in the facts and circumstances of the case, the Tribunal is right in confirming the fine in lieu of confiscation, especially when it was held that Rule 25 of Central Excise Rules is not covered to the present case?

ii) Whether the Tribunal can confirm the order of confiscation empowering the authorities to impose fine in the absence of Rule 25 of Central Excise Rules?

9. Learned counsel appearing for the appellant submitted that the violation observed by the authorities of the 2nd respondent is only a procedural irregularity and it cannot be construed as an act to defraud the exchequer of its rightful share by way of levy of duty. It is the further submission of the learned counsel for the appellant that the appellant is entitled to cenvat credit on inputs received by it and, therefore, there is no intention on the part of the appellant to evade payment of duty. It is further submitted by the learned counsel for the appellant that fine imposed in lieu of confiscation is a revenue neutralisation act in case of wrong doing. Since there is no gain reaped by the appellant, for want of any wrong doing, imposition of fine in lieu of confiscation is unsustainable. Learned counsel, laying stress on Rule 25 of the Central Excise Rules vehemently contended that once the penalty is set aside as the appellant is not falling within the categories enumerated under Rule 25 and, therefore, redemption fine is equally liable to be set aside as there would be no revenue loss to the exchequer. The Tribunal, having found that levy of penalty is unsustainable as the appellant does not fall under any of the categories listed under Rule 25 of the Central Excise Rules, has, however, gone on a tangent by upholding the redemption fine on the basis of the acceptance of the offence of clearance of goods without invoice by M/s. Sri Krishna Alloys, which is per se impermissible. The act of M/s. Sri Krishna Alloys in clearing the goods without invoice cannot be put against the appellant herein as the appellant would be entitled to take cenvat credit on any inputs received by them and, as stated earlier, there would be no revenue loss to the exchequer.

10. Learned counsel appearing for the appellant placed reliance

on the following judgments to drive home the point that once the penalty imposed under Section 25 of the Central Excise Rules is set aside, no redemption fine could be imposed on the appellant :-

- "i) Birla Yamha Works - Vs - Commissioner of Central Excise, Meerut - 2005 (183) ELT 194 (Tri. Del.) ;
- ii) Anchal Prints Pvt. Ltd. - Vs - Commissioner of Central Excise, Surat-I - 2009 (235) ELT 117 (Tri. Ahmd.) ;
- iii) Commissioner of Central Excise, Ludhiana - Vs - Ruby Dyeing & Finishing Mills - 2009 (244) ELT 106 (Tri. Del.) ; and
- iv) 2011 (274) ELT 582 (Tri. Mumbai)"

11. Per contra, learned counsel appearing for the Department submitted that the act of the appellant in receiving the goods without any invoice itself clearly depicts that the intention to evade payment of duty, be it by the appellant or by M/s. Sri Krishna Alloys. It is the submission of the learned counsel for the Department that when a particular thing has to be done in a particular manner, as envisaged under the statutory rules in force, non-compliance with the said statutory provision has to be put against the perpetrator. It is the further submission of the learned counsel for the Department that the Tribunal, though has rightly confirmed the redemption fine imposed on the appellant, however, has set aside the penalty on the ground that the appellant does not fall under any of the four categories envisaged under Rule 25 of the Central Excise Rules. The said finding of the Tribunal, is per se erroneous and is against the very spirit of the provision. Rule 25 of the Central Excise Rules contemplates confiscation and penalty on the producer, manufacturer, registered person of a warehouse or a registered dealer for contravention of certain provisions as mandated thereunder. The appellant, being a producer of M.S. Rods and Bars, has received M.S. Ingots from M/s. Sri Krishna Alloys for manufacturing purposes. Such being the case, Rule 25 would stand squarely attracted to the case of the appellant and the finding of the Tribunal that the appellant does not fall under any of the four categories mandated under Rule 25 is totally unfounded and unsustainable in law.

12. Heard the learned counsel appearing for the appellant and the learned counsel appearing for the Department and also considered the relevant provisions of law and the judgments relied on by the learned counsel for the appellant.

13. Before embarking upon deciding the contentions advanced by the learned counsel for the appellant vis-a-vis the learned counsel for the 2nd respondent/Department on the question of levy of redemption fine in lieu of confiscation and answering the substantial questions of law framed for consideration, it would be trite to advert to Rule 25 of the Central Excise Rules, which has been put in

issue to contend that redemption fine is not leviable, the Tribunal having set aside the penalty imposed on the appellant.

14. Rule 25 of the Central Excise Rules deals with confiscation and penalty and for better clarity, the same is extracted hereunder :-

"(1) Subject to the provisions of section 11AC of the Act, if any producer, manufacturer, 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

(b) does not account for any excisable goods produced or manufactured or stored by him; or

(c) engages in the manufacture, production or storage of any excisable goods without having applied for the registration certificate required under section 6 of the Act; or

(d) contravenes any of the provisions of these rules or the notifications issued under these rules with intent to evade payment of duty, then, all such goods shall be liable to confiscation and the producer or manufacturer or registered person of the warehouse or a registered dealer, as the case may be, shall be liable to a penalty not exceeding the duty on the excisable goods in respect of which any contravention of the nature referred to in clause (a) or clause (b) or clause (c) or clause (d) has been committed, or [rupees two thousand], whichever is greater.

An order under sub-rule (1) shall be issued by the Central Excise Officer, following the principles of natural justice."

15. It is the stand of the appellants, as held by the Tribunal, that they do not fall under any of the four categories adumbrated under Rule 25 of the Central Excise Rules, whereas the 2nd respondent/Department contends that the goods, viz., M.S. Ingots, having been manufactured/produced by M/s. Sri Krishna Alloys would not fall within the meaning of sale to the appellant, as the materials were sent to the appellant without raising any invoice and, therefore, the custody of the materials at the hands of the appellant, could, at best, be termed as safe custody. Therefore, the act of manufacture/production being there at the initial point, i.e., at M/s. Sri Krishna Alloys, the same would fall under Rule 25 of the Central Excise Rules and, therefore, if the seized materials were received by the appellant, for the purpose of production of M.S. Bars and Rods, for which the basic input is M.S. Ingots, the same could be taken by the appellant by payment of redemption fine, as the

appellant was also in collusion with M/s.Sri Krishna Alloys in the matter of clandestine removal of the inputs. Therefore, levying of redemption fine could not be said to be erroneous. It is further contended that the appellant having acted with mala fide intention and in collusion with M/s. Sri Krishna Alloys and having contravened the provisions as envisaged under the Central Excise Rules by receiving materials without a valid invoice, which is a statutory requirement, the act of the appellant could very well fall within the intention of evasion of payment of duty along with penalty.

16. Though the above contention and counter contention has been advanced on behalf of the parties, in the absence of any appeal filed by the Department challenging that portion of the order passed by the Tribunal, whereby levy of penalty was set aside, this Court is not inclined to look into the issue as is reflected in the eyes of the Department. The Tribunal having held that the act of the appellant does not fall within any of the four categories as envisaged under Rule 25, it is submitted by the appellant that at best it could be termed as technical procedural lapse, which act would not warrant imposition of penalty. The contention, as advanced by the appellant, merits acceptance. A cursory reading of Rule 25 of the Central Excise Rules reveal that if any producer, manufacturer, registered person of a warehouse or a registered dealer contravenes the provisions as envisaged under sub-rules (a) to (d) of Rule 25, then confiscation and penalty stand attracted. In the case on hand, the appellant has received the goods without invoice, which is a statutory requirement. The goods are mere raw material to be used in a manufacturing/production activity, that is being carried on by the appellant. Such being the undisputed factual position, as held by the Tribunal, the appellant will not fall within any of the four categories as envisaged under Rule 25 of the Central Excise Rules.

17. However, confiscation would still survive on considering the entire factual matrix. Rule 25 of the Central Excise Rules has to be read in continuation with Section 11AC of the Central Excise Act. Section 11AC of the Central Excise Act deals with penalty for short-levy or non-levy of duty in certain cases. For better clarity, Section 11AC is extracted hereunder :-

"Penalty for short-levy or non-levy of duty in certain cases.

Where any duty of excise has not been levied or paid or has been short-levied or shortpaid or erroneously refunded by reasons of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, the person who is liable to pay duty as determined under sub-section (2) of section 11A, shall also be liable to pay a penalty equal to the duty so determined :

(Emphasis Supplied)

[Provided that where such duty as determined under sub-section (2) of section 11A, and the interest payable thereon under section 11AB, is paid within thirty days from the date of communication of the order of the Central Excise Officer determining such duty, the amount of penalty liable to be paid by such person under this section shall be twenty-five per cent. of the duty so determined :

Provided further that the benefit of reduced penalty under the first proviso shall be available if the amount of penalty so determined has also been paid within the period of thirty days referred to in that proviso :

Provided also that where the duty determined to be payable is reduced or increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the court, then, for the purposes of this section, the duty as reduced or increased, as the case may be, shall be taken into account :

Provided also that in case where the duty determined to be payable is increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the court, then, the benefit of reduced penalty under the first proviso shall be available, if the amount of duty so increased, the interest payable thereon and twenty-five per cent. of the consequential increase of penalty have also been paid within thirty days of the communication of the order by which such increase in the duty takes effect.

Explanation. - For the removal of doubts, it is hereby declared that - (1) the provisions of this section which the order determining the duty under?shall also apply to cases in sub-section (2) of section 11A relates to notices issued prior to the date on which the Finance Act, 2000 receives the assent of the President;

(2) any amount paid to the credit of to the date of communication of the order referred?the Central Government prior to in the first proviso or the fourth proviso shall be adjusted against the total amount due from such person.]”

18. From a reading of Section 11AC, it is unambiguously clear that where any duty has not been paid, more particularly with an intention to evade payment of duty, the person is liable to pay duty as determined under sub-section (2) of Section 11A and is also liable to pay penalty equal to duty so determined.

19. In the case on hand, there is no dispute that the materials were moved from one place to another place and stored in the destination place without preparation of invoice. The appellant having received the goods without invoice from the seller and stored it within its factory premises, could be deemed to be holding the materials in safe custody on behalf of the seller, viz., M/s.Sri Krishna Alloys. The seller, being a manufacturer of M.S. Ingots, which has been transported to the appellant without valid invoice, would definitely fall under Section 11AC, being a person who has not paid duty on the commodity so manufactured. Though the appellant as well as M/s.Sri Krishna Alloys have come out with an explanation that for want of the signatory to sign the invoice, the invoice was not sent, but that would not absolve the seller of the liability to pay duty and the material so seized could be confiscated under Rule 25 of the Central Excise Rules. The explanation offered by the appellant as well as M/s.Sri Krishna Alloys cannot be said to be a plausible explanation so as to brush aside the stake of the department to its rightful share of duty claim. If something needs to be done in a particular manner, as is mandated under the relevant provision of law, it needs to be done in the said manner and trying to do the same in any other manner than the one contemplated under the law is trying to make mockery of the statutory provision, which is embodied under the Act. However, this Court refrains from expressing any further opinion on the issue, except to state that the appellant cannot wriggle out from under in the guise of trying to assert that there was no intention to evade duty. Though confiscation of the material was not made at the premises of M/s.Sri Krishna Alloys, but made at the premises of the appellant, the appellant being a person holding safe custody of the materials, without there being any valid invoice for receipt of the same as raw material, if wishes to retain the confiscated materials, could redeem the same on payment of fine, as has been ordered.

20. In the case on hand, the the appellant having received the materials and stored the same within its factory premises without valid invoice, can be said to be holding the materials in safe custody and, therefore, as held by the Tribunal, would not fall within the four corners of Rule 25 of the Central Excise Act read with Section 11AC of the Central Excise Rules. In such view of the matter, the finding arrived by the Tribunal that penalty is not imposable in view of the fact that the appellant would not fall within any of the four categories enumerated under Rule 25 of the Central Excise Rules cannot be said to be erroneous.

21. The appellant has challenged the levy of redemption fine, which has been confirmed by the Tribunal, based on the finding of the Tribunal that the appellant does not fall within the four categories enumerated under Rule 25 of the Central Excise Rules. The factum of non-raising of invoice had come to light only due to the surprise

inspection conducted by the Department, if not for which the action of M/s. Sri Krishna Alloys and the appellant would have gone unnoticed. Once the said error was found out by the inspection team, before issuance of show cause notice, duty was paid on the said clearance. Therefore, it is clear from the above that there was no revenue loss to the exchequer. However, mere payment of duty before issuance of show cause notice would not preclude the Department, from levying redemption fine, once the factum of evasion of duty is made out, be it mala fide or not. Further, as seen from the order of the Tribunal, the offence of clearance has been admitted by the seller, viz., M/s. Sri Krishna Alloys, which has not been disputed by the appellant herein. The fact that the goods were in the custody of the appellant on its transit from M/s. Sri Krishna Alloys, however, without proper invoice, could only be termed as safe custody of materials at the hands of the appellant, as has been held above. In such circumstances, levy of redemption fine on the goods manufactured by M/s. Sri Krishna Alloys for being used as raw materials at the hands of the appellant, could not be termed as erroneous or an unjustified act. Therefore, the order of the Tribunal confirming the redemption fine, as ordered by the Commissioner (Appeals) could not be termed as illegal. Further, the goods are valued at more than Rs.12 Lakhs, while the redemption fine has been fixed at a very paltry sum. That being the case, this Court sees no reason to interfere with that portion of the order. Accordingly, both the substantial questions of law are answered in favour of the Revenue and against the appellant.

22. For the reasons aforesaid, this appeal, being devoid of merits, is liable to be dismissed and, accordingly, the same is dismissed. However, in the circumstances of the case there shall be no order as to costs.

-Sd/-

Assistant Registrar

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Sub Assistant Registrar

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To

1. The Customs, Excise & Service Tax
Appellate Tribunal
South Regional Bench
Shastri Bhavan Annexe
Chennai 600 006.

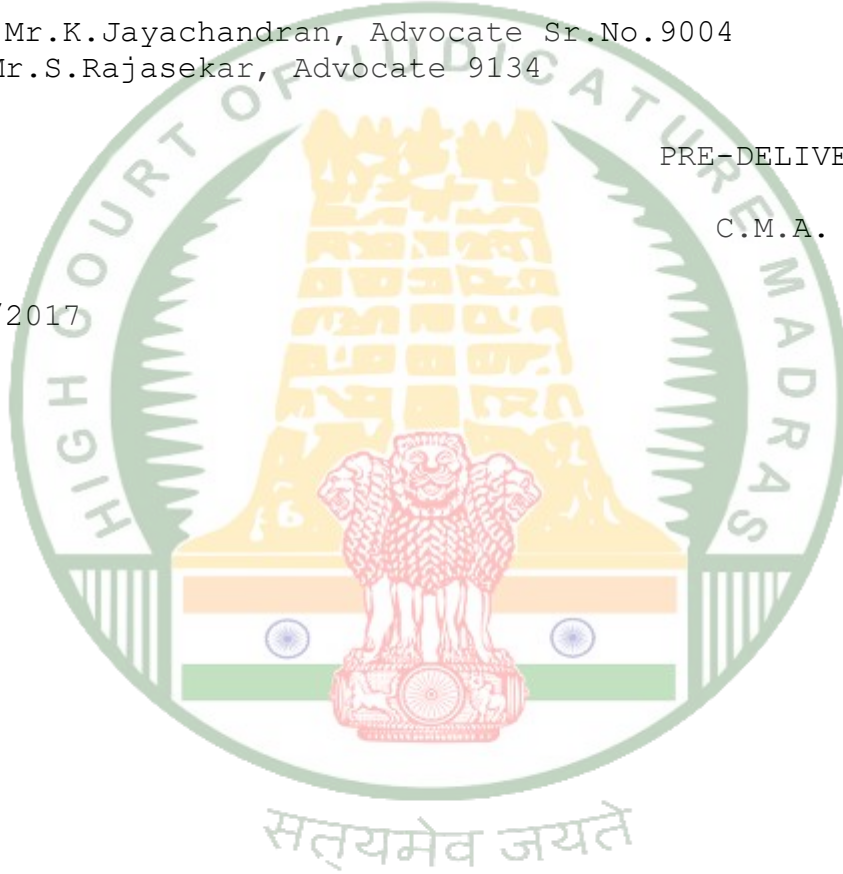
2. The Commissioner of Central Excise
Anaimeadu, Salem.

+ 1 cc to Mr.K.Jayachandran, Advocate Sr.No.9004
+1 cc to Mr.S.Rajasekar, Advocate 9134

PRE-DELIVERY JUDGMENT IN
C.M.A. NO. 151 OF 2010

KS (CO)

RRI 02/03/2017



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