

Gurbax Singh
2017.08.02 17:29

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

CEA No. 98 of 2014

Date of decision: 24.07.2017

M/s Kay Iron Works (Jorian) Private Limited

.....Appellant

Vs.

Commissioner of Central Excise, Delhi IV, New CGO Complex, NH-IV, Faridabad, Haryana

.....Respondent

**CORAM: HON'BLE MR. JUSTICE AJAY KUMAR MITTAL
HON'BLE MR. JUSTICE AMIT RAWAL**

Present: Mr. Deepak Gupta, Advocate for the appellant-assessee
in CEA No. 98 of 2014.

Mr. Sharan Sethi, Advocate for the appellant-assessee
in CEA No.1 of 2015.

Mr. Tajender K. Joshi, Senior Standing Counsel for the
respondent-revenue.

Ajay Kumar Mittal,J.

1. This order shall dispose of CEA Nos. 98 of 2014 and 01 of 2015 as according to the learned counsel for the parties, the issue involved in both the appeals is identical. However, the facts are being extracted from the CEA No.98 of 2014.

2. CEA No. 98 of 2014 has been preferred by the appellant-assessee under Section 35G of the Central Excise Act, 1944 (in short, "the CEA Act") seeking quashing of final Order dated 20.08.2014, Annexure A.1, passed by the Customs, Excise & Service Tax Appellate Tribunal, New Delhi (in short, "the Tribunal") in Appeal No. E/476/2012, claiming following substantial questions of law:-

- (i) “Whether Order passed by the learned Tribunal is sustainable when the Settlement Commission had settled the case of main notice?
- (ii) Whether penalty under Rule 25 of the Central Excise Rules, 2002 is sustainable in case goods are not held liable to confiscation as there were no goods?
- (iii) Whether maximum penalty is sustainable in case minimum penalty is not prescribed?
- (iv) Whether the impugned order is perverse and contrary to record?
- (v) Whether grave and palpable injustice would be caused to the Appellant if the respondents are permitted to execute the order?

3. A few facts necessary for adjudication of the controversy involved, as narrated in the appeal, may be noticed. The appellant-assessee is engaged in supply of capital goods. On 24.11.2006, the Directorate General of Central Excise Intelligence (DGCEI) on the basis of intelligence visited the premises of M/s TACL and summoned records for scrutiny. On the basis of the investigation, the DGCEI opined that the assessee supplied cenvatable invoices to M/s TACL without supplying capital goods and violated the provisions of Central Excise Rules, 2002 (in short, “the Rules”). The DGCEI vide show cause notice dated 5.3.2008 called upon the assessee to show cause as to why penalty under Rule 25 of the Rules should not be imposed. The assessee apart from M/s TACL filed an application under Section 32 of the Act before the Settlement Commission, New Delhi to settle the matter. The Settlement Commission rejected the application filed by the assessee and accepted the one filed

by M/s TACL. M/s TACL deposited the duty and interest of ₹ 26,04,960/- and ₹ 7,11,304/-. The Settlement Commission granted immunity to M/s TACL from prosecution and imposed penalty of ₹ 75,000/- vide order dated 1.10.2008, Annexure A.2. After rejection of the application by the Settlement Commission, the assessee contested the show cause notice and filed reply dated 17.03.2009. After considering the matter, the authority did not impose penalty under Rule 25 of the Rules, vide order dated 05.06.2009, Annexure A.3. Aggrieved by the order, the revenue filed an appeal before the Appellate Authority. Vide order dated 26.05.2010, Annexure A.4, the Appellate Authority modified the order and allowed the appeal filed by the respondent. Thereafter de novo adjudicating proceedings were initiated by the adjudicating authority. Vide order dated 27.08.2010, the assessee informed the authority that it had filed an appeal before the Tribunal against the order dated 26.05.2010 and requested to keep the matter pending till the disposal of the appeal. The adjudicating authority did not consider the submissions of the assessee and completed the proceedings vide order dated 29.12.2010, Annexure A.5, penalty of ₹ 1,62,400/- under Rule 25 of the Rules was imposed on the assessee. Feeling aggrieved, the assessee filed an appeal before the Appellate Authority. Vide order dated 14.11.2011, Annexure A.6, the order dated 29.12.2010 was upheld. The assessee filed second appeal along with stay application before the Tribunal. Vide order dated 20.08.2014, Annexure A.1, the Tribunal dismissed the appeal. Hence the instant appeal by the appellant-assessee.

4. We have heard learned counsel for the parties.

5. A perusal of the order passed by the Tribunal shows that it was conceded by the assessee before the authorities below that the

invoices were issued without even supplying any goods. It was also recorded that the Settlement Commission did not admit the case of the appellant and also that Settlement Commission nowhere had held that their order would be extended in the case of the appellant as well. With regard to the contention that the penalty under Rule 25 of the Rules could not be imposed as there were no goods involved, the Tribunal relying upon the judgment of this Court in **V.K. Enterprises Vs. CCE** (2011) 266 CCT 436, had held that the person purporting to sell goods could not say that he was not concerned with selling of goods and had not contravened the provisions of Rule 25 of the Rules. In such cases, the penalty was held to be imposable. The relevant findings recorded by the Tribunal in this regard read thus:-

“5. I have considered the facts and submissions of both sides. At the outset, it is to be mentioned that the appellants have conceded that the invoices were issued without ever supplying any goods. As regards their contention that the order of Settlement Commission in respect of M/s Talbros would cover them too, it is seen that the settlement Commission itself did not admit their case and such non admission was not on the ground that they would be covered by the main order in case of Talbros. The judgment in the case in K.I. International Limited (supra) takes note of the judgment in the case of S.K. Colombowala (supra) and holds that the benefit of the Settlement Commission’s order cannot be extended to those who never approached the Settlement Commission. The learned Advocate stated that the order in case of K.I. International Limited has been stayed by the High Court, but I find that the stay is an interim stay on condition of 50% deposit and bank guarantee for the remaining amount which obviously means that what has been stayed is the consequential recoveries in terms of that order. As stated earlier, the Settlement Commission itself did not

consider that the appellants would be covered by their order in case Talbros. As such, the contention of the appellants in this regard is not sustainable. The other contention of the appellants is that the penalty under Rule 25 cannot be imposed as there were no goods involved. It is seen that the Hon'ble Punjab and Haryana High Court in the case of Vee Kay Enterprises (supra) has discussed this very issue and has come to a finding that even in such cases, penalty can be imposed. The Hon'ble High Court observed that the person purporting to sell goods cannot say that he is not concerned with selling of goods and has not contravened the provisions of Rule 25 *ibid*. Relevant paras (9&10) of the said judgment are quoted below:

‘9. As regards applicability of provisions introduced on 1.3.2007 to alleged acts committed prior to the said date, the matter is covered by orders of this court referred to above which are not shown to be distinguishable. Accordingly, we hold that the amended provisions will not apply to the acts committed prior thereto.

’10. In spite of non applicability of Rule 26(2), penalty could be levied as the appellant was concerned in selling or dealing with the goods which were liable to confiscation in as much as the appellant claimed to have sold the goods in respect of which the Cenvat Credit was taken. In such a case, Rule 25(1)(d) and 26(1) are also applicable. The person who purports to sell goods cannot say that he was not a person concerned with the selling of goods and merely issued invoice or that he did not contravene a provision relating to evasion of duty. The appellant issued invoices without delivery of goods with intent to enable evasion of duty to which effect a finding has been recorded and which finding has not been challenged. We are, thus unable to hold that appellant was not liable to pay any penalty.”.

In the light of the foregoing, the appellants’ contention that they are not liable to penalty under Rule 25 is untenable.”

6. Further, the Tribunal had correctly held that the quantum of penalty in the circumstances of the present case could not be faulted on the ground that it was excessive.

7. The findings recorded by the Tribunal have not been shown to be illegal or perverse or based on misreading of evidence on record warranting interference by this Court. Thus, no substantial question of law arises. Consequently the appeal stands dismissed.

(Ajay Kumar Mittal)
Judge

July 24, 2017
'gs'
Whether speaking/reasoned
Whether reportable

(Amit Rawal)
Judge
Yes
Yes