IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

CEA-61-2017
Date of Decision: 7.3.2019

Commissioner of Central Excise and Service Tax, Sonepat

....Appellant.

Versus

Sh. Deepak Rai Walia, Chandigarh

...Respondent.

CORAM:- HON'BLE MR. JUSTICE AJAY KUMAR MITTAL.
HON'BLE MRS. JUSTICE MANJARI NEHRU KAUL.

PRESENT: Mr. Tajender K. Joshi, Sr. Standing Counsel for the appellant.
Mr. Amit Jhanji, Advocate for the respondent.

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AJAY KUMAR MITTAL, J.

1. This order shall dispose of a bunch of three appeals bearing CEA Nos.61, 62 and 63 of 2017 as according to learned counsel for the parties, identical questions of law and facts are involved therein. For brevity, the facts are being extracted from CEA-61-2017.

2. ITA-61-2017 has been filed by the revenue under Section 35G of the Central Excise Act, 1944 (in short "the Act") against the order dated 20.7.2016 (Annexure A-5) passed by the Customs, Excise and Service Tax Appellate Tribunal, Chandigarh Bench, Chandigarh, claiming the following substantial questions of law:-

i) Whether the CESTAT is justified in reducing the penalty amount to 25% of ₹ 1,63,00,000/- as the Party had committed serious fraud of taking Credit entries in their PLA without actually depositing the amount in the Govt. treasury, particularly when no

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such provision existed in the Central Excise Law during the relevant period?

ii) Whether the CESTAT is justified in allowing utilization of Cenvat Credit during the period from 18.01.2001 to 09.03.2002 amounting to ₹ 1,69,38,241/- and waving of equivalent penalty, especially when the Party was debarred from utilization of Cenvat Credit under Rule 8 of the Central Excise (No.2) Rules, 2001?

iii) Whether the CESTAT is justified in taking a lenient view by reducing the Personal Penalty to ₹ 50,000/- each on the two employees of the company who were instrumental in the entire fraud of taking fraudulent credit entries in the Party's PLA without making any actual deposits in the Government account?

3. Briefly stated, the facts necessary for adjudication of the instant appeals as narrated therein may be noticed. M/s Dhillon Kool Drinks & Beverages Ltd. (hereinafter referred to as "the Party") was engaged in the manufacture of aerated waters (Pepsi). Vide order dated 24.9.2001 in terms of Rule 8 of the Central Excise Rules, 2001 (in short "the Rules"), the Deputy Commissioner, Central Excise Division, Sonepat had withdrawn the facility for fortnightly payment of duty and payment through RG 23A Part II for a period of two months or till the deposit of defaulted amount whichever was later. Intelligence was gathered that the Party had started paying duty by manipulating the credit in the PLA account without actually

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depositing any amount in the bank. The Party had cleared the goods involving duty of ₹ 38 lakhs by showing payment of duty amounting to ₹10,90,000/- by debit entry on 21.10.2001 and ₹ 27,10,000/- vide entry dated 27.10.2001 in their current account. The Party took credit in their PLA account without actually depositing of the same through TR-6 challan. Thus, the Party instead of paying defaulted amount manipulated their account current and by showing that the default amount had been paid, restored the facility of fortnightly payment of duty on their own w.e.f. 18.1.2002 and started paying duty from the cenvat account. According to the revenue, during the period from 18.1.2002 to 8.3.2002, the Party had wrongly utilized cenvat credit of ₹ 1,69,38,241/- from RG 23A Part II account towards payment of duty on clearance of their excisable goods instead paying duty on consignments basis in terms of the order dated 24.9.2001. Therefore, such clearance of excisable goods utilizing cenvat credit had been effected without payment of duty in terms of Rule 8(4) of the Rules. The Party was not entitled to utilize the said cenvat credit for payment of duty as they did not clear the defaulted amount before restoring to the facility of fortnightly payment of duty, rather, they had manipulated the account current by showing that they had paid more than the TR-6 challan. In this way, the Party had defaulted an amount of ₹ 3,32,38,241/-, out of which an amount of ₹ 1,63,00,000/- pertained to fraudulent credit taken in account current on TR-6 challan and amount of ₹ 1,69,38,241/- was utilized by the Party for their cenvat credit account for payment of duty. Accordingly, a notice dated 22.12.2005 (Annexure A-1) was issued to the Party to show cause as to why the Central Excise Duty of ₹ 1,63,00,000/- along with interest be not confirmed; recovery of wrongly utilized cenvat

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credit of ₹ 1,69,38,241/- be not effected; penalty under Section 11AC of the Act be not imposed upon the Party and penalty under Rule 26 of the Rules be not imposed upon the respondents in CEA Nos. 61 and 63 of 2017. The adjudicating authority vide order dated 11.10.2006 (Annexure A-2) passed the following order:-

"(i) The demand of duty in respect of credit amounting to ₹ 1,63,00,000/- taken fraudulently by the party in their account current, without support of valid TR-6 challans and utilized towards payment of Central Excise Duty liability for clearances of their finished produce is confirmed from them under Section 11A(1) of the Central Excise Act, 1944 by invoking the proviso to the Section and the amount of ₹ 1,63,00,000/- already deposited by M/s Dhillon Kool Drinks & Beverages Ltd. towards the amount of Central Excise duty is appropriated as rightly paid under Section 11A(1) of the Act, ibid;

(ii) The demand of duty amounting to ₹ 1,69,38,241/- paid through Cenvat Credit is confirmed and should be recovered from M/s Dhillon Kool Drinks & Beverages Ltd. from Account current under Section 11A(1) of the Central Excise Act, 1944 by invoking the proviso to the Section;

(iii) Penalty of ₹ 3,32,38,241/- is imposed upon them under Section 11AC of the Central Excise Act, 1944;

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(iv) Personal penalty of ₹ 20,00,000/- is imposed on Shri Deepak Rai Walia, Executive Director of the party under Rule 26 of the Central Excise (No.2) Rules, 2001 and Central Excise Rules, 2002;

(v) Personal penalty of ₹ 10,00,000/- is imposed on Sh. Praveen Rana, Manager (Excise) of the party under Rule 26 of the Central Excise (No.2) Rules, 2001 and Central Excise Rules, 2002;

(vi) Interest at the appropriate rate is confirmed and may be recovered from the party under Section 11AB of the Central Excise Act, 1944 on ₹ 1,63,00,000/- + ₹ 1,69,38,241/-. The interest of ₹ 13,63,179/- already deposited is appropriated under Section 11AB of the Act, ibid."

4. The Party, Shri Praveen Rana, Manager (Excise) and Shri Deepak Rai Wali, Executive Director, filed appeals before the Tribunal. The Tribunal vide order dated 9.4.2007 (Annexure A-3) disposed of the appeal and remanded the matter to the adjudicating authority as the order was passed in the absence of the appellants therein. In pursuance thereto, the adjudicating authority vide order dated 19.11.2007 (Annexure A-4) reconfirmed the demands as had been confirmed vide order dated 11.10.2006 and also enhanced personal penalties on Shri Deepak Rai Walia from ₹ 20,00,000/- to ₹ 30,00,000/- and from ₹ 10,00,000/- to ₹ 20,00,000/- upon Shri Praveen Rana. Feeling aggrieved by the order, Annexure A-4, they filed appeals before the Tribunal. The Tribunal vide order dated 20.7.2016 (Annexure A-5) disposed of all the three appeals by setting aside

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the demand of ₹ 1,69,38,241/- and the penalty. Further, the Tribunal reduced the penalty to 25% of ₹ 1,63,00,000/- and confirmed the personal penalty of ₹ 50,000/- each upon S/Shri Deepak Rai Walia and Praveen Rana. Hence, the present appeals by the revenue.

5. We have heard learned counsel for the parties.

6. The Deputy Commissioner, Central Excise Division, Sonepat vide order dated 24.9.2001 passed in terms of Rule 8 of the Rules had withdrawn the facility for fortnightly payment of duty and payment through RG 23A Part II for a period of two months or till the deposit of defaulted amount whichever was later. The Party had paid whole of the defaulted amount along with interest on 17.10.2001. Since the Party had made the whole of the dues within one month, therefore, they were entitled to utilize their cenvat credit account for payment of duty w.e.f. 24.11.2001. The Tribunal had noticed that the Party had not contravened the provisions of Rule 8(3A) of the Rules by utilizing the credit account for payment of duty w.e.f. 18.1.2002. Therefore, the demand of ₹ 1,69,38,241/- was set aside by the Tribunal and the Party was not liable to pay any penalty in this regard. After making the defaulted payment by 17.10.2001, the Party had taken the credit in their PLA without payment of duty on 21.11.2001 which continued till 13.1.2002. After being pointed out by the revenue that they had taken the excess credit in their PLA without making the payment through TR-6 challan on 9.3.2002 and 15.3.2002 along with interest, the Party had paid the said amount. Since the Party had taken the credit in the PLA without payment and had paid whole of the amount along with interest before the issuance of the show cause notice, the Tribunal had reduced the penalty to 25% of ₹ 1,63,00,000/- and directed to pay the same within a

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period of 30 days failing which they would be liable to pay penalty equivalent to the amount of duty confirmed, i.e. ₹ 1,63,00,000/-. Regarding the personal penalties upon Shri Deepak Rai Walia (respondent in CEA-61-2017) and Shri Praveen Rana (respondent in CEA-63-2017), the Tribunal had observed since they are the responsible officials of the Party and had admitted their mistake, the imposition of nominal penalty upon them would meet the ends of justice and accordingly imposed the penalty of ₹ 50,000/- each on both the officials. The relevant findings recorded by the Tribunal read thus:-

> "6. On careful consideration of the submissions made by both sides, we find that vide order dated 24.9.2001 in terms of Rule 8 of Central Excise Rules, 2001 the facility for fortnightly payment of duty and payment of duty for a period of two months or till the deposit of defaulted amount whichever was later. We have seen that the appellant has paid whole of the defaulted amount along with interest on 17.10.2001. These facts are evidence from RT-12 returns and the same has not been disputed by the adjudicating authority. In that circumstances, as the appellant has made the whole of dues within one month, therefore, the appellant is entitled to utilize their cenvat credit account for payment of duty with effect from 24.11.2001. Admittedly as per the impugned order, the appellant started utilizing the account

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current with effect from 18.1.2002, in that circumstances, we hold that the appellant has not contravened the provisions of Rule 8(3A) of the Central Excise Rules, 2001 by utilizing the credit account for payment of duty with effect from 18.1.2002, therefore, the demand of ₹ 1,69,38,241/- is not sustainable. Accordingly, the same is set aside and no penalty is imposable on the appellant against this charge.

7. We further find that after making defaulted payment by 17.10.2001, the appellant first time taken the credit in their PLA without payment of duty on 21.11.2001. The same continued till 13.01.2002 and the said amount was also paid by the appellant on being pointed out by the Revenue that they have taken the excess credit in their PLA without making the payment through TR-6 challan on 9.3.2002 and 15.3.2002 along with interest. These facts are not in dispute and the show cause notice has been issued to the appellant on 22.12.2005 by invoking the extended period of limitation. As the appellant has not disputed the payment of duty of ₹ 1,63,00,000/- along with interest and have admitted the same, in that circumstances, the issue before us is to be considered for imposition of penalties on the

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appellants. The sole contention of the appellant is that they were receiving the communication from their head office with regard to the payment of duty through TR-6 challan telephonically wrongly and therefore, they have taken the credit i.e. due to mistake of the concerned official. In that circumstance, the penalty is not imposable. We find that although there may be mistake of the appellants but the appellants cannot take the benefit of the same as they have taken the credit in the PLA without making payment. In the circumstances, we are of the view that the penalties are imposable on the appellants. Further, we find that the whole of the amount in dispute was paid along with interest before issuance of show cause notice. In the circumstances, the penalty is reduced to 25% of ₹ 1,63,00,000/-. Accordingly, the appellants are directed to pay the amount of penalty within a period of 30 days from the communication of this order failing which the appellants are liable to pay penalty equivalent to the amount of duty confirmed against the appellant i.e. ₹ 1,63,00,000/-.

8. We also take note of the fact that the penalties on the co-appellants are imposed but in the impugned order, their role has not been

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specified specifically but it was observed that the statement made by the official, Shri Praveen Rana, Manager and Shri Deepak Rai Walia, Executive Director are not convincing. We find that Shri Praveen Rana and Shri Deepak Rai Walia are the responsible officials of the appellant company but they have admitted their mistake only, in that circumstance, the imposition of nominal penalty on both the appellants shall meet the ends of justice. In the circumstance, the penalties on both the appellants, namely, Shri Praveen Rana and Shri Deepak Rai Walia are confirmed for their mistake to the tune of ₹ 50,000/- each."

7. No illegality or perversity could be pointed out by the learned counsel for the revenue in the aforesaid findings recorded by the Tribunal in all the three appeals which may warrant interference by this Court. Accordingly, the substantial questions of law are answered against the revenue and in favour of the assessee. The appeals stand dismissed.

(AJAY KUMAR MITTAL)
JUDGE

March 7, 2019
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(MANJARI NEHRU KAUL)
JUDGE

Whether Speaking/Reasoned **Yes/No**

Whether Reportable **Yes/No**

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