

**2014 (2) ECS (210) (Tri. - Ahm.)**

In the Customs, Excise & Service Tax Appellate Tribunal

West Zonal Bench, Ahmedabad

**M/S. SHREE LABDHI PRINTS**

VS.

**CCE & S.T. SURAT**

**Date of Hearing; 24.03.2014**

**Date of Decision: 01.04.2014**

Appeal No. E/1461/2009 & E/1462/2009

[Arising out of the Order-in-Appeal No. RKA/542-543/SRT-I/2009 dated 30.07.2009 passed by the Commissioner (Appeals), Customs & Central Excise Customs Surat.],

Appearance:

Shri M.N. Saiyed Consulant

for the appellant

Shri S.K. Mall, AR

for the respondent

**CORAM-**

Hon'ble Mr. M.V. Ravindran, Member(Judicial)

Hon'ble Mr. H.K. Thakur, Member (Technical)

*Order No A/10477-10478/2014. dt. 01.04.2014*

**In the present proceedings appellant was a party to the fraud committed in availing CENVAT credit on grey fabrics which was never received. Accordingly, CENVAT credit has been correctly denied by the lower authorities by invoking the extended period (para 5.2).**

**So far as the extending the option of 25% reduced penalty under section 11 AC to the main appellant is concerned, it is observed that neither the adjudicating authority nor the first appellate authority has allowed this option to the main appellant. Accordingly, the main appellant is allowed to avail the option of payment of 25% reduced penalty under section 11 AC of the Central Excise Act, 1944 if the entire amount of duty and interest along with 25% reduced penalty is paid within one month from the receipt of this order (para 5.3).**

**In the present case there was clear cut knowledge of the Partner Shri Biren H. Vekharia that credit is being taken fraudulently. Therefore, penalty imposed upon him has been correctly upheld by the first appellate authority (para 6).**

**Per : Mr. H.K. Thakur;**

Appeal No. E/1461/2009-DB has been filed by main appellant M/s. Shree Labdhi Prints, Surat and appeal No. E/1462/2009 has been filed by Shri Biren R. Vakharia, Partner of the main appellant. Both these appeals have been filed against OIA No. RKA/542-543/SRT-I2009 dated 30.07.2009 passed by Commissioner (Appeals) upholding the OIO No. 154/ADJ/JC-VKS/OA/08-09 dated 30.12.2008. Under the OIO dated 30.12.2008 CENVAT credit of Rs. 1053855 was disallowed to the main appellant along with charging interest and an equivalent to the main penalty was also imposed upon the main appellant. A penalty of Rs. 105385 was also imposed upon Shri Biren H. Vekharia, Partner of the main appellant by the Adjudicating authority.

2. Brief facts of the case are that main appellant was availing CENVAT credit and utilized the same for the payment of Central Excise duty on clearance of their final products. On scrutiny of the ER-3/ER-1 returns filed by the appellant and the CENVAT credit accounts of the unit, it was observed that the appellant had availed CENVAT credit amounting to Rs. 1053855 on the invoices issued by M/s. I.G. Fabrics, M/s. Inder Silk Mills which were endorsed in favour of the appellant. The inquiries undertaken also revealed that the aforesaid manufactures/suppliers of grey fabrics did not exist. Statement of Shri Biren H. Vakhari, partner of the main appellant was recorded on 20.04.2005. On being shown the invoice issued by M/s. I.G. Fabrics he stated that they had received those invoices from Shri Girdharilal Dadhich and taken CENVAT credit in their CENVAT credit accounts that grey fabrics as shown in the invoices of M/s. I.G. Fabrics had not been received by them and only the invoices had been received on the basis of which they had taken CENVAT credit in their books of accounts; that they had shown the processing of the grey fabrics and clearances of the same under the cover of invoices issued by them only on paper and in actuality no movement of grey had taken place; that the vehicles nos. mentioned on the invoices of processed fabrics of their mills was their own and they had not been used in those transactions as no physical movement of goods had been taken place. On being asked to state the system of payment of jobs charged and excise duty for the paper truncation arranged between M/s. Inder Silk Mills, M/s. I.G. Fabrics and M/s. Suryanarayan Silk Mills Pvt. Limited and Shri Biren H. Vakharia stated the main appellant had received the cheques against the jobs charges and excise duty from Shri Girdhari Lal Dadhich and paid the case in lieu of those cheques to them as no job work had taken place that he voluntarily tendered the cheque of Rs. 1085910 towards payment of CENVAT credit wrongly availed by them on the basis of the invoices of M/s. Inder Silk Mills / M/s. I.G. Fabrics.

2.1. After completing the Investigation and issue of show cause notice the entire demand of Rs. 1085910 was confirmed and adjusted against the payments made by the appellant. Appeals filed by the appellants were also rejected by the first appellate authority against which the present appeals have been filed.

3. Shri M.N. Saiyed (Consultant) appearing on behalf of the appellants argued that CENVAT credit has been taken by the main appellant on the basis of grey fabrics received from the merchant manufacturers and that entire CENVAT credit taken was deposit before the issue of show cause notice. It was his case that once the entire demand was paid before the issue of show cause notice then there is no point in imposing penalties upon the appellants. It was also his case that benefit of 25% reduced penalty under Section 11AC of the Central Excise Act 1944 was not extended to them by the lower authorities. On penalty imposed upon the partner Shri Biren H. Vakharia it was argued that no penalty is imposable on the partner once the firm has been penalized.
4. Shri K. Sivakumar (AR) appraring on belief of the Revenue argued that investigation conducted in this case clearly revealed that appellants were a party to the fraud and well aware of the facts that there is only movement of invoices without the present of inputs on which credit was taken. He made the bench go through Para 9 and 12 of the judgment passed by Gujarat High Court in the case of Prayagraj Dyeing and Printing Mills Pvt. Limited vs. UOI [2013(290) ELT 61 (Guj.)] and emphasized the facts before the Hon'ble High Court were that appellants were not aware of the fraud committed by the dealer. It was his case that credit has been correctly denied to main appellant.on imposition of penalty upon the partner he relied upon the case law of Bombay High Court in the case of Textoplast Industries vs. Additional Commissioner of Customs [2011( 272) ELT 513(Bom.)] and argued that in view of the Supreme Court's judgment in the case of Standard Chartered Bank vs. Directorate of Enforcement [2006 (197) ELT 18 (SC)], discussed in Para 17 of the Bombay High Court's decision in the case of Textoplast Industries penalty is also separately imposed upon the partners.
5. Heard both side and perused the case records. So far as admissibility of CENVAT credit in invoices of grey fabrics is concerned, it is evident from the evidences on record especially statement dated 20.04.2005 of Shri Biren H. Vakharia, Partner of the main appellant that only invoices were received by the appellant without receipt of grey of fabrics covering those invoices. The supplier of the grey fabrics have been found to be non existent hence the invoices on the basis of which credit has been taken are to be considered as forged.

Shri Vakharia in his been taken are to be considered as forged. Additional text Shri Vakharia in his statement inter-alia admitted that the whole transactions are sham being mere paper transactions. He explained that the impugned invoices of grey fabrics were made available to him by one Shri Girdharia Dadhich. In his statement Shri Dadhich admitted that he in conspiracy with one Shri Yogesh Vashi fraudulently obtained registration in the name of M/s. Inder Silk Mills and M/s. I.G. Fabrics and made fraudulent declaration of stock to avail. Deemed credit. The evidence in the form of Panchanama and alert circulars have not been challenged nor there is any retractment of statements.

5.1. Hon'ble High Court of Gujarat in the cases of Prayagraj Dyeing and printing Mills Pvt. Limited vs. UOI (supra) made following observations in Para 9 and 12 reproduced below:-

9. It is also not a case where the invoices are manufacture documents not signed by the original manufacture. The invoices in which are accounted for in the Return of the person, were the invoices accounted for in the Return of the person registered with the Central Excise. Thus, merely because the manufacture cannot be found at the present, such fact cannot make the invoices issued fake or fraudulent documents in the eye of law. These are actual invoices issued by the manufacture who is duly registered under the Central Excise Act and therefore those cannot be said to be forged documents. In our opinion merely because today the original manufacture who is registered with the Revenue is not traceable it does not mean that he did not exist at the relevant point of time. If today a manufacture is not available for the various reasons that does not mean that at the relevant point of time such manufacture who was registered with the Central Excise did not exist. In our opinion once receipt of goods is not disputed by a person taking credit and necessary invoices are issued he is entitled to take credit provided however that he took reasonable steps to ensure that the inputs or the capital goods in respects of which he had taken CENVAT credit are the goods on which appropriate duty of excise as indicated in the documents accompanying the goods has been paid.

10. ....

11. ....

12. The next question is whether demand of reversal is barred by the period of limitation. In our opinion in view of our above finding that if the original document is issued even by practicing fraud a holder in due course for valuable consideration unless shown to be a party to a fraud, cannot be proceeded with by taking aid of

a larger period of limitation as indicated in Section 11A(1) of the Act. It is now settled law that Section 11A(1) is applicable when there is positive evasion of duty and mere failure to pay duty does not render larger period transferees were party to any fraud and therefore the Revenue cannot rely upon a larger period of limitation. Our aforesaid view finds support from the following decision of the Supreme Court:

- (i) CCE v. Chemphar Drugs & Liniments, reported in 1989 (40) E.L.T. 276.
- (ii) Padmini Products v. Collector of Central Excise, reported in 1989 (43 E.L.T. 195.
- (iii) Lubrichem Industries Limited v. CCE, Bombay reported in 1944 (73) E.L.T. 257.
- (iv) Nesle (India) Limited v. CCE, Chandigarh reported in 2009 (235) E.L.T. 577."

5.2. It is evident from the above observation that the facts before the Hon'ble High Court were different than the facts of this case. In the present proceeding appellant was a party to the fraud committed in availing CENVAT credit on gray fabrics which was never received. Accordingly, CENVAT credit has been correctly denied by the lower authorities by invoking extended period.

5.3. So far as extending the option of 25% reduced penalty under Section 11AC to the main appellant is concerned, it is observed that neither the adjudicating authority nor the first appellant authority has allowed this option to the main appellant. Accordingly main appellant is allowed to avail the option of payment of 25% reduced penalty under Section 11AC of Central Excise Act 1944 if the entire amount of duty and interest along with 25% reduced penalty is paid within one month from the receipt of this order.

6. So far as imposition of penalty upon the Partner of the main appellant is concerned Hon'ble Bombay High Court after relying upon the Apex Court's judgment in the case of Textoplast Industries vs. Additional Commissioner of Customs (supra) has held in Para 17 as follows:-

"17. While concluding it would be necessary to advert to a judgment of a Division Bench of this Court in Commissioner of Customs v. Jupiter Exports-2007 (213) E.L.T. 641(Bom). In that case a notice to show cause was issued by the Commissioner of Customs on an allegation of the misuse of the DEEC Scheme by adopting fraudulent means to obtain a higher entitlement in respect of duty free import. The Commissioner of Customs confirmed the duty demanded and imposed penalties on the main Partner who had actively participated

in the business of the firm. In appeal the Tribunal held that the firm was liable to pay duty only to the extent of goods actually imported by it quantified in amount of Rs. 1.38 lakhs. As the bulk of the imports were made by bonafide transferees of the licenses obtained and sold by the Petitioner the Tribunal held that the Petitioner could not be considered to be the importer for the recovery of the duty. An appeal was filed by the Revenue while a Petition was filed by the firm seeking enforcement of the order of the Tribunal. This Court in the Course of its judgment held that "no fault can be found with the view taken by the Tribunal" since "it is now well settled that when partnership is penalized separate penalties cannot be imposed on the partners". Evidently the judgment of the Supreme Court in *Slandered Chartered Bank v. Directorate of Enforcement* 2006 (197) E.L.T. 18 (S.C.) was not drawn to the attention of the Court. The Observation in regard to the well settled position is with respect contrary to the law laid down by the Supreme Court in the *Standard Chartered Bank* case. The judgment of the the Supreme Court binds us and we hence have followed the position enunciated therein. Similarly in the case of *Collector of Excise and Customs Surat - II v. Mohammed Farookh Mohammed Ghani* 2010 (259) E.L.T. 179 (Guj.) the Division Bench of the Gujarat High Court relied upon the general principal in the law of partnership that a firm has no legal existence apart from its partners and held that once a penalty was levied on the firm it amounted to a levy on the partners and hence there would be no questions of penalizing the partners separately. The Gujarat High Court held the explanation Section 140 was for the purposes of liability in respects of Commissioner of offences under the Act whereas there was no such corresponding provision in relation to the imposition of a penalty under the Act. The Gujarat High Court has also not considered the principal enunciated by the Supreme Court in the *Standard Chartered Bank* case. As a matter of fact in a judgment of the Supreme Court in *Prakash Metal Works v. Collector of the Central Excise* 2007 (216) E.L.T. 660 (S.C.) Hon'ble Mr. Justice S.H. Kapadia (as the Learned Chief Justice then was) speaking for the supreme Court upheld an order of the Tribunal imposing a penalty on partners of a firm as well as on the partnership firm".

In the present case there was clear cut knowledge of the Partner Shri Biren H. Vikharia that credit is being taken fraudulently. Therefore penalty imposed upon him has correctly upheld by the first appellate authority.

7. In view of the above appeal filed by the appellants rejected to the extent indicated in Para 5.2 and 6 above and allowed only to the extent indicated in Para 5.3 above.