2014 (4) ECS (135) (Tri.- Del.)

In the Customs Excise & Service Tax Appellate Tribunal

West Block No.2, R. K. Puram, New Delhi-110066

M/s. UNITED CHAIN INDUSTRIES

V/s.

C.C.E., FARIDABAD

Date of Hearing/ Order: 20.8.2014

Appeal No. E/526/2012-EX(SM)

[Arising out of Order-in-Appeal No. 162-163/CE/Appl/DLH-IV/2011 dated 14.11.2011 passed by the Commissioner (Appeals), Central Excise, Delhi-IV]

Appearance:
Shri Aalok Arora, Advocate — For the Appellant
Shri D. Singh, D.R. — For the Respondent

CORAM:
Hon'ble Mr. R.K. Singh, Member (Technical)

(Final Order No. 53456/2014)

"The benefit of Settlement Commission's order cannot be extended to the parties which never approached the Settlement Commission. Ld. A.R. also elaborated the extent to which the appellants had gone in committing this fraud. They manipulated the transport documents as on enquiry it was revealed that the vehicle numbers given in invoices pertained to such vehicles which could not have carried such capital goods as mentioned in the invoices. Not only that, the appellants showed purchase of the non-existent goods, and then issued cenvatable invoices for the same non-existent goods in favour of Talbros." (Para 4)

"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." (Para 5)

Per: R.K. Singh:
The appellants have filed this appeal against the Order-in-Appeal No. 162-163/CE/Appl/DLH-IV/2011 dated 14.11.2011 in terms of which a penalty of Rs.1,59,200/- imposed vide Order-in-Original No. 18/ADC/Adjn/2010-11 dated 15.12.2010 has been upheld.

2. The facts, briefly stated, are as under:

The appellant had issued invoices for certain capital goods on the

basis of which M/s Talbros Automotive Components Ltd. took credit of Rs.1,59,200/-. The invoices were allegedly issued without ever supplying any goods. M/s Talbros Automotive Components (Talbros for short) had allegedly received such invoices (without goods) issued by several other suppliers also. The DGCEI made a case and issued Show Cause Notices to M/s Talbros as well as the appellants alongwith other such suppliers. M/s. Talbros and the appellants approached the Settlement Commission. The Settlement Commission did not find the appellants' case eligible for settlement and therefore the appellants' case was not admitted by the Settlement Commission. Consequently the appellants case was adjudicated. The adjudication order was upheld by the Commissioner (Appeals) and that is how the appellants are before this Tribunal. It may be pertinent to mention that at first the adjudicating authority did not impose any penalty on the appellants. However, that order was reviewed and appealed against. The Commissioner (Appeals) remanded the case for de novo adjudication. It was at the time of de novo adjudication that the impugned penalty was imposed and subsequently upheld by Commissioner (Appeals) vide the impugned order-in-appeal.

3. The appellants have essentially conceded that the invoices were issued without supplying any goods. They have however contended that :

(1) Once the case has been settled by the Settlement Commissioner for M/s Talbros Automotive Components, the case should be treated as settled for all noticees. They cited the judgement in the case of S.K. Colombowala Vs. CC (Import), Mumbai - 2007 (220) ELT 492 (Tri.-Mumbai).

(2) A penalty under Rule 25 of Central Excise Rules 2002 cannot be imposed as there are no goods involved. They referred to the Cestat Larger Bench judgment in the case of Steel Tubes of India Ltd. Vs. CCE - 2007 (217) ELT 506 (Tri.-LB), wherein it has been held that penalty under Rule 209A of erstwhile Central Excise Rules, 1944 is not imposable when there are no goods involved.

(3) The penalty imposed is the maximum possible and even under Section 11AC of Central Excise Act 1994, an option to pay penalty equal to 25% of the duty involved is available.

4. Ld. A.R. on the other hand, cited the judgement of Punjab & Haryana High Court in the case of Vee Kay Enterprises Vs. CCE - 2011 (266) ELT 436 (P&H) which in effect held that when such a

person purports to sell goods with the invoices, it cannot be said that there are no goods involved or that he was not concerned in selling of goods. The said judgement has been followed by CESTAT in the case of CCE Vs. Navneet Agarwal - 2012 (276) ELT 515 (Tri.-Ahmd.). The ld. A.R. also cited the judgement of CESTAT in the case of K.I. International Ltd. Vs. CC, Chennai - 2012 (282) ELT 67 (Tri.-Chennai) which inter alia holds that the benefit of Settlement Commission's order cannot be extended to the parties which never approached the Settlement Commission. Ld. A.R. also elaborated the extent to which the appellants had gone in committing this fraud. They manipulated the transport documents as on enquiry it was revealed that the vehicle numbers given in invoices pertained to such vehicles which could not have carried such capital goods as mentioned in the invoices. Not only that, the appellants showed purchase of the non-existent goods, and then issued cenvatable invoices for the same non-existent goods in favour of Talbros.

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 judgement in the case in K.I. International Ltd. (supra) takes note of the judgement 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 ld. Advocate stated that the order in case of K.I. International Ltd. 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 & 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 below:

> "9 As regards applicability of provisions introduced on 01.03.2007 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.
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> "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 inasmuch 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 ibid is untenable.

6. Coming to the quantum of penalty and the appellant's prayer that penalty is much on the higher side as even under Section 11AC ibid the penalty is reduced to 25% of duty involved, it is to be noted that such reduction to 25% of duty involved, under Section 11AC ibid is subject to several conditions. Further in the case of the appellants, the fraud committed is deliberate and blatant and involved manipulation of documents. In fact, I find no mitigating factors in this case to justify lower penalty.

7. In view of the foregoing, I do not find any infirmity in the impugned order. The appeal is dismissed.

(Dictated & pronounced in open Court)