

HIGH COURT OF CHHATTISGARH, BILASPUR
Tax Case No. 104 of 2010

Union of India through Commissioner, Central Excise and Customs, Central Excise Bhawan, Dhamtari Road, Tikarapara, Raipur, Chhattisgarh 492001

---- Appellant

Versus

M/s. Chhattisgarh Electricity Co. Ltd. Siltara Industrial Growth Centre, Siltara, Raipur, Chhattisgarh.

---- Respondent

For Appellant	:	Shri Maneesh Sharma, Advocate.
For Respondent	:	None.

Hon'ble Shri Navin Sinha, Chief Justice
Hon'ble Shri P. Sam Koshy, J.

Judgment on Board

Per Navin Sinha, Chief Justice

20/07/2015

1. The present appeal arises from order dated 3.11.2009 in Appeal No. E/254/2006-Excise Branch, passed by the Customs, Excise & Service Tax Appellate Tribunal, New Delhi (hereinafter called 'the Tribunal').

2. The Tribunal held that the Respondent was liable to pay 8% of the value of electricity sold to outside buyers for the period October 2001 to July 2003 as it had failed to demonstrate fulfillment of the eligibility conditions laid down in Rule 6(2) of the Cenvat Credit Rules, 2002 and did not maintain separate accounts for receipt, consumption and inventory of inputs meant for use in the generation/manufacture of electricity sold to outside buyers. Holding that there was no deliberate intention to evade duty, the Tribunal opined not to levy penalty for normal period of liability relying on 2009 (240) ELT 641 (SC) (Maruti Suzuki Ltd. v. Commissioner of Central Excise, Delhi III) and remanded the matter to the adjudicating authority for working out the quantum of demand, but only for the normal period i.e. one year.

3. The order sheets of this case reveal that the Respondent was represented by Counsel on 14.6.2010. It was again duly represented on 25.6.2010 by the same Counsel. On that date, there was an office note that no Vakalatnama had been filed by the Counsel. The Respondent continued to be represented by the same Counsel on 30.6.2010, when the office again pointed out the defect that no Vakalatnama had been filed on its behalf. The Respondent continued to be represented by the same Counsel on 3.8.2010 and 16.8.2010 again with the office note that Vakalatnama had not been filed. The Respondent was represented by the same Counsel on 6.9.2010 when submission was made on its behalf that Tax Case (PR) No. 1843 of 2010 had been filed by it as cross-appeal. The order sheet of Tax Case (PR) No. 1843 of 2010 reveals that it stood dismissed for non-compliance of the peremptory order dated 29.9.2011 for removing the defects.

4. The order sheet dated 17.6.2015 adequately notices the past dates of appearances on behalf of Respondent and that none was present on its behalf on the former date. The office note that no power had yet been filed on behalf of Respondent was also noticed but the name of the Counsel was not appearing in the cause list. Pursuant to the directions in this regard, name of the Counsel for the Respondent was printed in the cause list as noticed in the order dated 7.7.2015 when still there was no representation on its behalf. Today also name of the Counsel for the Respondent is printed in the cause list but there is no representation on its behalf.

5. If the Respondent has not taken adequate steps to protect its interest for which the Court has granted more than sufficient opportunity, it has only itself to blame. The Court cannot wait ad infinitum. If a party with full awareness of the pendency of a case against it, more particularly after having entered appearance and filed cross appeal also does not ensure its representation, it is not open for it to urge that the order has been passed behind its back or

without opportunity of hearing. The situation is the creation of the Respondent and it must bear the burden.

6. Learned Counsel for the Appellant invites our attention to Rule 6 (2) of the Cenvat Credit Rules (hereinafter referred to as 'the Rules') which reads as follows :-

(2) Where a manufacturer avails of CENVAT credit in respect of any inputs, except inputs intended to be **used as fuel**, and manufactures such final products which are chargeable to duty as well as exempted goods, then the manufacturer shall maintain separate accounts for receipt, consumption and inventory of inputs meant for use in the manufacture of dutiable final products and the quantity of inputs meant for use in the manufacture of dutiable final products and the quantity of inputs meant for use in the manufacture of exempted goods and take CENVAT credit only on that quantity of inputs which is intended for use in the manufacture of dutiable goods"

7. Learned Counsel for the Appellant on basis of the aforesaid Rule submits that it was a statutory obligation of the Respondent to maintain separate accounts with regard to the inputs used by it regarding electricity sold to outsiders leviable to excise duty and that used for captive consumption not liable for excise duty to avail the benefit of Cenvat credit. Our attention is also invited to Section 11A sub clause (4) of the Central Excise Act, 1944 (hereinafter called 'the Act') which reads as follows:

"Where any duty of excise has not been levied or paid or has been short levied or short paid or erroneously refunded, by the reason of-

(a) fraud; or

(b) collusion; or

(c) any willful mis-statement; or

(d) suppression of facts; or

(e) contravention of any of the provisions of this Act or of the rules made there under with intent to evade payment of duty.

by any person chargeable with the duty, the Central Excise Officer shall, within five years from the relevant date, serve notice on such person requiring him to show cause why he should not pay the amount specified in the notice alongwith interest payable thereon under Section 11AA and penalty equivalent to the duty specified in the notice."

8. Learned Counsel next submits that the Tribunal has come to the conclusion that the Respondent did not maintain separate accounts with regard to inputs used for generation of electricity meant for sale to outsiders and that for captive consumption. A statutory presumption therefore arises under Section 11A (4) (e) of the Act that it was done to evade payment of duty. The onus was on the Respondent to disprove the same. The Tribunal has erred by relying on Section 11A(1) of the Act to hold that there was no intention to evade payment of duty, without any basis. There can never be direct evidence of intention. It is to be gathered cumulatively in the facts of each case. The Tribunal should not have confined liability for the normal period only.

9. If no separate records were maintained, the direction of the Tribunal to quantify the generation sale and consumption under the two heads was a physical impossibility. He lastly submits that the Tribunal has completely erred in relying upon paragraph M/s. Maruti Suzuki Ltd. (supra) which related to definition of the word 'input' only and did not concern issues arising for consideration presently.

10. We have considered the submissions on behalf of the Appellant.

11. A judgment of a Court has to be read in its entirety and not by culling out one paragraph of the same torn out of context. In (1987) 1 SCC 213 (Ambica Quarry Works v. State of Gujarat) it was observed :-

"18.....The ratio of any decision must be understood in the background of the facts of that case. It has been said long time ago that a case is only an authority for what it actually decides, and not what logically follows from it....."

12. The question urged before us for non-compliance of the statutory requirement under Rule 6 (2) and the statutory presumption under Section 11A(4)(e) has not been considered by the Tribunal. We are further of the opinion that if no separate accounts were maintained, how was the separate quantification to be arrived at has also not been discussed by the Tribunal.

13. For all the aforesaid reasons, we are satisfied that the order under appeal dated 3.11.2009 is not sustainable in its present form. It is set aside. The matter is remanded to the Tribunal for hearing the parties afresh and then decide the matter by a fresh reasoned and speaking order within a maximum period of three months from the date of receipt and/or presentation of a copy of this order. If the Respondent does not enter appearance despite service of notice, nothing prevents the Tribunal from considering the matter in its ex-parte jurisdiction also, but in accordance with law.

14. The appeal is allowed.

Sd/-
(Navin Sinha)
CHIEF JUSTICE

Sd/-
(P. Sam Koshy)
JUDGE