IN THE HIGH COURT OF JUDICATURE AT

BOMBAY

BENCH AT AURANGABAD.

CENTRAL EXCISE APPEAL NO.08 OF 2015.

M/s Omsairam Steel and
Alloys Pvt.Ltd.
F-1/2/3, Additional MIDC,
PH-II, Jalna,Maharashtra … Appellant.

Versus

The Commissioner,
Central Excise &
Customs, N-5,Cidco,
2015Aurangabad. … Respondent.

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Mr.S.C.Sarda, advocate for the Appellant.
Mrs.Kalpalata Patil (Bharaswadkar), advocate for Respondent.

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CORAM : S.V.GANGAPURWALA &
A.I.S.CHEEMA,JJ.

Date : 13.04.2015.

PER COURT :

1. The present appeal is against the order passed by the CESTAT U/s 35F of the Central Excise Act, thereby directing the appellant to

deposit 50% of the basic duty amount.

2. Mr.Sarda, learned counsel for the appellant submits that on 11.1.2011 after gap of more than one year, the Respondent No.2 issued show cause notice to the appellant alleging that the appellant assessee has contravened the provisions of Rule 3,4, 9 of CENVAT Credit Rules, 2004 and Rules 4,6,8,10 and 12 of Central Excise Rules 2002 read with proviso to Section 11A(1) of the Central Excise Act, 1944. It is further averred that the total amount of Rs.93,98,567/- (Rupees ninety three lacs ninety eight thousand five hundred sixty seven) availed and utilised by the appellant as CENVAT credit is recoverable under proviso to Section 11A(i) of the Central Excise Act, 1944 read with Rule 14 of the CENVAT Credit Rules and further that the appellant is rendered liable for penalty under Rule 50 of the CENVAT Credit Rules read with Section 11A(c) of the Central Excise Act, 1944. The appellant replied the show cause notice, attended the hearing. The appellant's request for extension of time was not considered. The Respondent No.2

passed the order dated 23.11.2011, demanding Rs.93,98,567/- (Rupees ninety three lacs ninety eight thousand five hundred sixty seven only) and penalty of equal sum i.e. Rs.93,98,567/- (Rupees ninety three lacs ninety eight thousand five hundred sixty seven only) along with interest. The appellant filed appeal along with stay application before the CESTAT. The CESTAT disposed of the stay application exparte without affording opportunity of hearing to the appellant and directed appellant to deposit 50% of the duty confirmed as per adjudication order. The learned counsel submits that applicant filed Misc. Application for recalling of the said order and restoration of stay application, however, the same was disposed of and the appellant was directed pre-deposit of 50% of the duty confirmed as per the adjudication order. The appellant filed application for rectification of mistake in the aforesaid stay order dated 24.9.2013. The same was disposed of and direction for pre-deposit of 50% deposit was confirmed. CESTAT without hearing the appeal on merit, dismissed the appeal for non-compliance of the stay order dated 27.11.2013. The learned counsel submits that the amendment i.e. Explanation 2 to Rule 2(K) of the CENVAT Credit Rules, 2004, by notification dated 7.7.2009 is prospective in operation and not retrospective one. The CESTAT is not right in denying the credit retrospectively. The learned CESTAT was in error in holding that support structures of manufacturing machinery can not be treated as parts, components, accessories and hence capital goods within the meaning of Rule 2A of CENVAT Credit Rules. The appellant has rightly availed the CENVAT credit. The supporting structures for production machineries can be treated as input used in or in relation to the manufacture of final products within the meaning of Rule 2(K) of the CENVAT Credit Rules. As such CENVAT credit could be allowed. The learned counsel further submits that this Court in similar set of facts had dispensed with the condition of pre-deposit in a case of **“Ambuja Cement Ltd. Vs. Commissioner of Central Excise and Service Tax”** reported in **2013 (292) E.L.T.20 (Bom.).** The learned counsel has also provided the copy of order of this

Court dated 12.9.2014. In a case of **“M/s Ram Ritesh Inspact Pvt. Ltd. Vs. Union of India and others”,** wherein this Court allowed the appellant to deposit only 25% of the amount of duty demanded.

3. On the merits of the submissions the learned counsel for the appellant also relied on the judgments of the Apex Court in a case of **“Commissioner, Central Excise Vs. Rajasthan Spinning and Weaving Mills Ltd.”** reported in **(2010 [255] ELT 481,** in a case of **“Collector of Central Excise Vs. Chempher Drugs and Liniments” (1989 (40) E.L.T.276,** to contend that extended period of five years is applicable only when something positive other than mere inaction or failure on the part of manufacturer is proved. The conscious or deliberate withholding of information by manufacturer is necessary to invoke larger limitation of five years. In the present case this condition is not satisfied, as such the revenue would not be entitled for the benefit of extended period of five years of limitation. The learned counsel as such states

that the condition of pre-deposit is erroneous.

4. Mrs.Bharaswadkar, learned counsel for the Respondents submits that the appellant was not entitled to avail the benefit of CENVAT credit during the relevant period as the appellant had committed default in payment of duty. The Department was within its right to invoke the extended period of limitation of five years. According to the learned counsel, the larger Bench of the Tribunal in a case of **“Vandana Global Ltd. Vs. CCE, Raipur”,** reported in **2010 (253) E.L.T.440(Tri. - LB),** has held that the amendment has retrospective effect. According to the learned counsel,proviso to Section 35F of the Central Excise Act for waiver of the pre-deposit is not satisfied. CESTAT has directed to deposit only 50% of the duty demanded and not of the penalty amount with interest thereon. Penalty levied is equal to the duty amount. So in fact, the appellant has to deposit less than 25% of the total demand which is reasonable.

5. We have considered the submissions canvassed by the learned counsel for respective parties. Though submissions were tried to be canvassed on the merits of the matter, it would be inappropriate for this Court to enter into the contention advanced on merits of the matter as it is for the CESTAT to consider the same on merits. The stage is only with regard to the pre-deposit as ordered by the CESTAT U/s 35F. It would be relevant to refer to Section 35F of the Central Excise Act, which reads as under :

> *"35F. Deposit, pending appeal, of duty demanded or penalty levied. - Where in any appeal under this Chapter, the decision or order appealed against relates to any duty demanded in respect of goods which are not under the control of Central Excise authorities or any penalty levied under this Act, the person desirous of appealing against such decision or order shall, pending the appeal, deposit with the adjudicating authority the duty*

demanded or the penalty levied."

***Provided** that where in any particular case, the (Commissioner (Appeals) or the Appellate Tribunal is of the opinion that the deposit of duty demanded or penalty levied would cause undue hardship to such person, the Commissioner (Appeals) or, as the case may be, the Appellate Tribunal, may dispense with such deposit subject to such conditions as he or it may deem fit to impose so as to safeguard the interests of revenue.*

***[Provided** further that where an application is filed before the Commissioner (Appeals) for dispensing with the deposit of duty demanded or penalty levied under the first proviso, the Commissioner (Appeals) shall where it is possible to do so, decide such application within thirty days from the date of its filing]"*

6. Perusal of Section 35F, it is manifest

that condition to deposit the amount is a Rule, however, if the circumstances as appearing in proviso to Section 35F are spelt out then the appellate authority has power to dispense with such deposit subject to such conditions as it may deem fit to impose, so as to safeguard the interest of revenue.

7. The appellant is in fact contending on the merits of the contentions. How the deposit of the said amount as directed would cause undue hardship to the appellant is not being stated. Directions to pre-deposit is a discretionary order. Of-course, the said discretion is judicious discretion which has to be exercised as per judicial norms and legal principles. This Court would consider whether the said discretion has been exercised in a judicious manner. The order of this Court in a case of **"Ambuja Cement Ltd. Vs. Commissioner of Central Excise and Service Tax"** referred supra is a discretionary order.

8. As we have referred above that the

merits of the contentions will be required to be considered by the CESTAT while hearing the matter on merit, we do not find that condition of pre-deposit of 50% of duty demanded would cause any undue hardship to the appellant nor it is put forth by the appellant that the same would cause undue hardship to the appellant, we are not inclined to interfere with the discretion exercised by the CESTAT. It would not be appropriate to substitute our discretion to the discretion exercised by the CESTAT, more particularly, when the same is not shown to have caused any undue hardship. In fact, the amount of pre-deposit is only 25% of the whole amount of duty and penalty demanded. In other Judgment referred by the appellant, this Court had directed pre-deposit of 25%. That was with regard to the facts and circumstances of the said case.

9. Now as per amended Section 35F, the appellant is required to deposit seven and half per cent of the duty demanded or penalty imposed or both. However, said amended Section 35F would

not inure to the benefit of appellant as the same is subsequent to the order passed by the CESTAT.

10. In light of the above, the appeal is dismissed. It would appear that the time granted for pre-deposit of the amount has expired and the appeal is dismissed. It would be appropriate to extend the time to deposit the amount as directed by the CESTAT. The appellant is permitted to deposit the amount as directed by CESTAT as pre-deposit within a period of six (6) weeks from today. In case amount is deposited within a period of six (6) weeks from today then CESTAT shall hear the appeal filed by the appellant on its own merits.

11. The appeal is accordingly disposed of with aforesaid observations and directions.

(A.I.S.CHEEMA,J.) **(S.V.GANGAPURWALA,J.)**

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