IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

CENTRAL EXCISE APPEAL NO. 58 OF 2005

The Commissioner of Central Excise	}	
Mumbai – IV	}	
115, Central Excise Bldg.,	}	
Maharshi Karve Road, Mumbai 400 020	}	**Appellant**

versus

M/s. Dilip Chhabaria Designs Pvt. Ltd.	}	
having registered office and	}	
manufacturing unit at	}	
(i) Keytuo Industrial compound,	}	
Kondivita Village Road, MIDC,	}	
Andheri (East) Mumbai – 400 059	}	
	}	
Manufacturing unit located at -	}	
Plot No. 2, Survey No. 15, Khanvel Road,	}	
Rakholi Village, Silvassa – 396 230	}	
	}	
Manufacturing unit located at -	}	
Gala Nos. 3, 4, 5 and 6, Clifiwala	}	
Compound, Next to M/s. L&T,	}	
near Oxford Chambers, Powai, Mumbai	}	**Respondent**

Mr. Jitendra B. Mishra for the Appellant.

Mr. Rajeev Waglay with Mr. B. G. Tangsali for the Respondent.

CORAM :- S. C. DHARMADHIKARI &
SUNIL P. DESHMUKH, JJ.

DATED :- MARCH 12, 2015

ORAL JUDGMENT:- (Per S.C.Dharmadhikari, J.)

This Appeal by the Revenue has been admitted on 10th January, 2006 on the following substantial question of law:-

> "Whether on the facts and the circumstances of the case the tribunal was right in granting the benefit of duty exemption under Notification No. 3/2001-C.E. Dated 1.3.2001 to M/s. Dilip Chhabaria Designs Pvt. Ltd. since the assessee has not fulfilled the in-built condition no. 41 of the notfn. i.e. the assessee has not reversed the Cenvat Credit availed on certain inputs like glasses, paints etc. used in the manufacture of vehicles before availing the said exemption."

2) The Revenue impugns an order passed on 27th July, 2004 by the Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench, Mumbai, Allowing the Appeal of the Respondent/Assessee and setting aside the order-in-original dated 10th December, 2003 passed by the Commissioner of Central Excise, Mumbai IV. The Respondent has manufacturing units at Andheri, Mumbai and at Silvasa. There is another unit in Mumbai itself and the Assessee is engaged in manufacture of motor vehicles and parts and accessories of motor vehicles falling under Chapter No. 87 of the First Schedule to the Central Excise Tariff Act, 1985. The Revenue alleges that on the basis of specific intelligence that the Assessee was evading Central Excise Duty by way of clandestine removal of excisable goods, search operations were carried out at the above premises by the officers of the Director General of Central Excise Intelligence, West Zone, Mumbai. This investigation revealed that the Assessee was engaged in building body

on the chassis of motor vehicles and that it was not paying duty on bus/tempo travelers manufactured by it availing exemption under Notification No. 3/2001-C.E. Dated 1st March, 2001. However, the exemption was conditional upon the Assessee not taking credit of duty paid on chassis or other inputs used in the manufacture of such vehicles. In other words, such credit should not be taken. However, the Assessee availed Modvat Credit on glasses and paints during the year 2000-01. The Assessee was therefore liable to pay duty on buses, tempo travelers valued at Rs.1,03,04,873/- cleared upto March, 2001. Therefore, a show cause notice demanding Central Excise Duty amounting to Rs.16,48,780/- was issued and for this alleged contravention of the Notification. The show cause notice dated 31st December, 2002/1st January, 2003 was adjudicated and the adjudicating authority concluded that the Assessee was not entitled to the benefit of the Exemption Notification. The findings in that regard are categoric. The findings deal with various contentions raised, but we are only concerned with the issue of availment or entitlement of exemption under Notification No. 3/2001-C.E.

3) The Assessee's reply to the show cause notice revealed that it was not disputing that it took Modvat Credit on the glasses which were used in the manufacture of bodies of buses/tempo travelers and

this violates condition No. 41 of the subject Notification. This credit was not reversed at the time of removal of goods or after removal. The Modvat lapsed on 1st April, 2002 on surrender of licence. No efforts were made to reverse the Modvat.

4) The case law relied upon by the Assessee was distinguished on facts. The order-in-original concludes that in the present case, the Assessee had taken the credit and did not reverse it despite several opportunities. In the circumstances, the benefit of the Exemption Notification was rightly denied and the Assessee was called upon to pay the duty demanded to the tune of Rs. 16,48,780/- and penalty.

5) This order was challenged by the Assessee before the Tribunal and the Bench of the Tribunal held that the issue stands concluded by the Judgments of the Hon'ble Supreme Court in the case of *Chandrapur Magnet Wires Pvt. Ltd. vs. Commissioner of Central Excise, Nagpur* reported in **1996 (81) ELT 3 (SC)** and *Orisa Extrusion Ltd. vs. Commissioner of Central Excise* reported in **1998 (83) ELT 308** so also decisions of the Tribunal. Thus, the conclusion was that the duty part of the credit in the RG23A Register was not utilised. That had lapsed due to the Assessee no longer being under the Excise net. The question of reversal was therefore only an exercise in accounting. In the circumstances, the benefit of the Notification cannot be denied. Thus,

on such a conclusion and finding that the reversal of Modvat Credit is only to the tune of Rs.36,246/- which also has lapsed that the order-in-original was set aside. The Appeal was allowed. The correctness of this conclusion is assailed before us by the Revenue.

6) Mr. Mishra appearing for the Revenue in support of this Appeal submits that the show cause notice contains a specific allegation. That allegation has been completely missed by the Tribunal. The investigation revealing that the Assessee claimed exemption which was not unconditional, then, the Tribunal was obliged to consider not only the impact of the condition but the allegation in the show cause notice in its entirety and the response of the Assessee thereto. Mr. Mishra has invited our attention to the reply, which has been furnished to the show cause notice. He submits that in the present case, the stand of the Assessee was that even though exemption was claimed, there was no intentional act. The written submissions, to which our attention has been invited by Mr. Mishra, according to him, contain an admission. The argument of Mr. Mishra is that the plea of the Assessee that everything was done by inadvertence cannot be accepted. He invites our attention to page 133 of the paper book at para 2 of the written submissions in support of the above arguments.

7) Mr. Mishra also submits that the language of the Exemption Notification being plain and clear, it being conditional, the Tribunal should have given effect to it. The Tribunal erred in reading into it certain requirements and which were not to be found in the document itself. There was no question of going into the contention as to whether the credit was merely availed and not taken. In such circumstances, all the decisions relied upon by the Tribunal were distinguishable on facts.

8) Mr. Waglay appearing for the Assessee supports the conclusion of the Tribunal. He submits that the Tribunal's conclusion that credit should be taken is in consonance with the language of condition No. 41 and that of the Exemption Notification. Once the credit was merely availed of but not taken, then, this was not a intentional or deliberate act. Further, the credit was only to the tune of Rs.36,246/-. That has lapsed in full after surrender of the licence w.e.f. 1st April, 2002. In the circumstances, the Tribunal's conclusion is supported by Mr. Waglay by relying upon Judgment of the Hon'ble Supreme Court in the case of *Commissioner of Central Excise, Mumbai-I vs. Bombay Dyeing and Manufacturing Co. Ltd.* reported in **(2007) 8 SCC 177** and that of the High Court of Karnataka in the case of *Commissioner of Central Excise and S. T. LTU, Bangalore vs. Bill Forge Pvt. Ltd.* reported in **2012 (279) ELT 209 (Kar.)**. He also relied upon

an order passed by the High Court of Gujarat in the case of *Commissioner of Central Excise vs. Ashima Dyecot Ltd.* reported in **2008 (232) ELT 580 (Guj.)**.

9) Mr. Waglay therefore submits that the Appeal deserves to be dismissed and the substantial question of law should be answered in favour of the Assessee.

10) We have perused the Appeal paper book with the assistance of the Counsel appearing for the parties. We have also perused Notification No. 3/2001-C.E., copy of which has been produced before us by Mr. Mishra.

11) That Notification states that in exercise of powers conferred by sub-section (1) of section 5A of the Central Excise Act, 1944 (1 of 1944), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts excisable goods of the description specified in column (3) of the Table below or specified in column (3) of the said Table read with the concerned List appended hereto, as the case may be, and falling within the Chapter, heading No. or sub-heading No. of the First Schedule to the Central Excise Tariff Act, 1985 specified in the corresponding entry in column (2) of the said Table, from so much of the duty of excise specified thereon under the

First Schedule to the Central Excise Tariff Act, as is in excess of the amount calculated at the rate specified in the corresponding entry in column (4) of the said Table and from so much of the special duty of excise leviable thereon under the Second Schedule to the Central Excise Tariff Act, as is in excess of the amount calculated at the rate specified in the corresponding entry in column (5) of the said Table and importantly subject to the relevant conditions specified in the Annexure to this Notification and referred to in the corresponding entry in column (6) of the said Table.

12) As far as the Assessee is concerned, it is undisputed before us that the Assessee manufactures motor vehicles, principally designed for the transport of more than six persons, excluding the driver, including station wagons. Sr. No. 229 of the Table describes this product and Chapter Heading 87. This is conditional exemption as is apparent from the Entry in column (6). That refers to condition No. 41. This condition reads as under:-

> *"41. If manufactured out of chassis falling under heading No. 87.06 on which duty of excise has been paid and no credit of duty paid on such chassis and other inputs used in the manufacture of such vehicle has been taken under rule 57AB or rule 57AK of the Central excise Rules, 1944;*
> *Provided that this exemption is not applicable to a manufacturer of said vehicles-*
> *(a) who is manufacturing such vehicle on a chassis supplied by a chassis manufacturer, the ownership of which remains vested in the chassis manufacturer or the sale of the vehicle so manufactured is made by such chassis manufacturer on his account; and*

(b) who is manufacturing chassis and using such chassis for further manufacture of such vehicle."

13) A perusal of this condition would reveal that if the said goods or products, if manufactured out of chassis falling under Heading No. 87.06 on which duty of excise has been paid and no credit of duty paid on such chassis and other inputs used in the manufacture of such vehicle has been taken under rule 57AB or rule 57AK of the Central Excise Rules, 1944, the exemption is admissible.

14) The show cause notice made a specific allegation that the Assessee removed excisable goods and the activity which was undertaken by the Assessee amounted to manufacture. The excisable goods could not have been cleared and removed without payment of duty. However, the Assessee relied upon the Exemption Notification referred to above. The Assessee was aware of the fact that this is a conditional exemption. The Assessee was aware of the language of the Notification as also the condition. In the circumstances, when the credit was taken, the Assessee was not entitled to the benefit of the Exemption Notification. During the course of the proceedings, the Assessee tendered written submissions and what we find that on the issue of benefit of Notification No. 3/2001-C.E., the Assessee stated that this benefit of Notification was availed of in respect of buses and tempo travelers manufactured by the Appellant. The Assessee says that no

doubt it has contravened condition No. 41 by availing of the Modvat benefit in respect of glasses purchased, but that happened inadvertently since the duty payable Rs.16,48,780/- was more than the Modvat benefit of Rs.36,246/- and no prudent businessman would make such a mistake intentionally. Copies of invoices were annexed and relied upon. But committing of the mistake does not mean that it is irreversible. It can be corrected even afterwards. In the present case, even though the Modvat was taken in RG23A, it was never utilized. In the present case, the excise licence itself was surrendered on 1st April, 2002, the Modvat credit taken by the Appellant automatically lapsed on 1st April, 2002. Therefore, the benefit of Exemption Notification be granted.

15) To our mind, this was a clear distinguishing feature from the cases and decisions relied upon by the Tribunal. The order-in-original concluded and to our mind rightly that this was an admitted position of a clandestine removal. There was no payment of excise duty by the manufacturer on excisable goods. The payment was not made by claiming exemption and entitlement under Notification No. 3/2001-C.E. which is a conditional exemption. This is a case of admitted Modvat Credit taken on glasses used in the manufacture of buses and tempo travelers. The Assessee did not reverse the Modvat Credit at the time of removal of goods or after removal. No efforts were made by the

Assessee to reverse the same. In the circumstances, when there is an admitted position emerging from the record, we are of the view that the Tribunal erred in law in reversing such a conclusion in the order-in-original. The Tribunal, in reversing this order, relied upon the cases and which have been brought to our notice. We must note them and in some details.

16) In the case of *Commissioner of Central Excise and S. T. LTU, Bangalore* (supra), the facts speak for themselves. There, the Assessee was engaged in the manufacture of accessories of motor vehicles falling under Chapter Sub Heading 8708 10 90 of the Central Excise Tariff. They availed Cenvat Credit of duty paid on the inputs, capital goods and the taxable services used in the manufacture of final product. During the scrutiny of the ER-1 return for the month of June, 2007, it was observed that the Assessee had taken excess credit of Rs.98,77,446/- on capital goods. This was pointed out to the Assessee. The Assessee, by letter dated 12th September, 2007 admitted the wrong committed by them and informed the Revenue that they have reversed the same in September, 2007. They have over drawn only an amount of Rs.11,691/- in payment of Education Cess for the month of July, 2007 and the interest liability calculated thereon at Rs.184/- has since been debited in their PLA account on 27th September, 2007. A show cause

notice was issued to the Assessee calling upon them to show cause as to why they should not be levied interest and penalty for wrongful availment of Cenvat Credit. In reply, the argument of the Assessee was that the mistake of taking excess credit has occurred only in the capital good's credit account and not in the other account, namely, input credit and service tax credit. The availment of excess credit has not resulted in any over drawal in the credit account. Therefore, no interest is payable on such wrongly availed credit. In view of the reversal of the credit and interest paid for the overdrawn, they requested for dropping of further proceedings. The assessing authority held that the mistake is an intentional one, made with an intention of avoiding payment of duty and therefore they are liable to pay penalty and interest from the date of availment of credit. This order of the Commissioner was challenged before the Tribunal. The Tribunal concluded that the Assessee had not taken irregular credit with an intention to avoid payment of duty. The imposition of penalty was set aside. Insofar as the interest payment is concerned, the Tribunal concluded that the records indicate that the credit was not actually taken for utilisation. Therefore, question of payment of interest would not arise. Hence, even the direction to pay interest was set aside. That is how the Revenue was aggrieved and carried the matter in Appeal.

17) The High Court of Karnataka summarized the legal principles and concluded that in such cases and when the provision is attracted, where the Cenvat Credit has been taken or utilized wrongly or has been erroneously refunded, imposition of penalty or interest was not justifiable. We do not find that the conclusions reached in paras 19 and 20 and with the backdrop of only a book entry that this decision could have been relied upon by the Tribunal to set aside the order of the Commissioner.

18) In the case of *Bombay Dyeing and Mfg. Co. Ltd.* (supra) there was a mill, where there was a spinning section where yarn was spun from raw cotton and a weaving section where grey fabric was woven from such yarn. Those grey fabrics were processed not by that mill but by another mill of the Assessee and some quantity thereof was sold to third parties. The assessment period was 13th March, 2002 to 15th September, 2002. The Assessee opted for exemption under Notification No. 14/2002 under which grey fabrics, not subjected to any process, were chargeable to nil rate of duty subject to condition that the said fabrics were made from textile yarn on which appropriate duty of excise stood paid and no credit for duty paid on inputs had been taken under the Cenvat Credit Rules, 2002. The Assessee opted to pay duty on yarn on deferred basis at the time of clearance of grey fabric for

home consumption along with interest at the rate prescribed under section 11AB of the Central Excise Act, 1944 read with Rule 8(3) of the Central Excise Rules, 2002. The Department refused permission to the Assessee to do so. However, the Assessee reversed the Cenvat Credit, which, according to the Department, contravened the provisions of the said Notification. The Department took the view that the Assessee was not entitled to claim nil rate of duty as according to it, the Assessee had failed to pay duty on yarn at the spindle stage and had also taken credit for the duty paid on inputs under the Cenvat Credit Rules, 2002. That is how the demand was raised. The Commissioner (Appeals) allowed the Assessee's Appeal and his order was upheld by the Tribunal. The Revenue approached the Hon'ble Supreme Court. In dismissing the Appeal, the Hon'ble Supreme Court held that the Notification does not prescribe the mode of payment. Exemption is given to the final product, namely, grey fabric. Levy is on manufacture but payment is at the time of clearance. Payment of duty on yarn had to be at the spindle stage. However, the Exemption Notification granted exemption on grey fabric and it was admissible subject to the Assessee paying duty on yarn before claiming exemption and subject to the Assessee not claiming Cenvat Credit before claiming exemption. In the case before the Hon'ble Supreme Court, payment of duty on yarn on deferred basis took place before clearance of grey fabric on which exemption was claimed.

Therefore, payment was made before the stage of exemption. Similarly, on payment of duty on the yarn, the Assessee got the credit which was never utilized. Before utilization, the entry had been reversed which amounted to not taking credit. Both conditions of the Notification were satisfied and the Tribunals conclusion was upheld.

19) In the case at hand, however, the undisputed position is otherwise. The Assessee admits taking of credit and contrary to the condition No. 41 of the Exemption Notification, which enables it to claim or remove the goods at nil duty. Knowing fully well, the Assessee could not have availed of the benefit of such exemption Notification. The activity or process in this case amounts to manufacture is undisputed. That the goods have been removed without payment of duty is the conclusion reached in the order-in-original. Such a conclusion, which was not perverse and neither vitiated in law should not have been interfered with by the Tribunal. The Tribunal's reasoning and relying upon these decisions, which we have noted above, is erroneous to say the least. We do not see as to how such Judgments and decisions rendered by the Hon'ble Supreme Court, other High Courts or the Tribunal could have been relied upon. The reversal of the order passed by the Commissioner being vitiated as above, we have no alternative but to allow this Appeal.

20) The Appeal is accordingly allowed. The substantial question of law is answered in favour of the Revenue and against the Assessee. In the circumstances, however, there would be no order as to costs.

21) When we pronounced this order, Mr. Waglay, on instructions, states that Assessee is ready and willing to pay the amount of Modvat Credit and wrongly availed to the tune of Rs.36,246/- with interest at 18% till the date of payment. Mr. Mishra, however, submits that the crucial and relevant date in this case is of removal of excisable goods. No such offer was ever made, the credit was never reversed nor there was any offer to pay the duty and on deferred basis. Therefore, such a concession should not be taken cognizance of.

22) In the light of the conclusion that we have reached, we see some force in the submission of Mr. Mishra and we decline to accede to the said request of Mr. Waglay. Then, Mr. Waglay submits that the penalty of Rs.16,48,780/- imposed in the order-in-original and which has been set aside by the Tribunal should not be interfered with. Mr.Mishra submits that once there was a clandestine removal and with an intent to evade payment of duty by wrongful availment of Exemption Notification and the ingredients of section 11AC have been satisfied and attracted, therefore, the penalty should not be set aside.

23) Having heard the learned Counsel on this point and noting that such a direction in the order-in-original was set aside by the Tribunal and the Revenue having succeeded before us, in the facts and circumstances of this case, without creating any precedent, we delete the direction to pay penalty in the sum of Rs.16,48,780/-. Barring this modification, the order-in-original is maintained.

(SUNIL P. DESHMUKH, J.) **(S.C.DHARMADHIKARI, J.)**