

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 04.06.2015

CORAM

THE HONOURABLE MR. JUSTICE R.SUDHAKAR
AND
THE HONOURABLE MS. JUSTICE K.B.K.VASUKI

C.M.A. NOS. 3420 & 3421 OF 2008

The Commissioner of Central Excise
Central Excise Commissionerate
No.1, Williams Road
Tiruchirappalli 620 001.

... Appellant in both the appeals

- Vs -

1. Customs, Excise & Service
Tax Appellate Tribunal
Shastri Bhavan Annexe
No.26, Haddows Road
Chennai 600 006.

2. M/s.Dalmia Cements (Bharat) Ltd.
Dalmiapuram, Tiruchirappalli. ... Respondents in both the appeals

Appeals filed against the order dated 14.11.07 passed by the
Customs, Excise and Service Tax Appellate Tribunal, South Zonal
Bench, Chennai, made in Final Order No.1515 and 1516 of 2007.

For Appellant : Mr. T.Chandrasekaran

For Respondents : Mr. S.Muthu Venkataraman for
M/s. G.RM. Palaniappan for R-2

COMMON JUDGMENT

(DELIVERED BY R.SUDHAKAR, J.)

The present appeals have been preferred by the Revenue, aggrieved against the order passed by the Tribunal which, while dismissed the appeal filed by the Revenue, allowed the appeal filed by the assessee. Vide order dated 12.11.08, this Court, while admitting these appeals, framed the following substantial questions of law for consideration:-

"C.M.A. No.3420/2008

1. Whether the inputs and capital goods used in a power plant and on which Cenvat credit of duty had been taken could be deemed as removed as such in terms of the provisions of Rule 3 (5) of the Cenvat Credit Rules, 2004, when the right to use the said power plant along with the land, building, plant and machinery were leased by the assessee for consideration to another company?

2. Whether on such lease the assessee shall have to pay an amount equal to the credit availed in respect of such inputs or capital goods in terms of Rule 3 (5) of the Cenvat Credit Rules, 2004, deeming the transfer of the right to use the said power plant comprising the land, building, plant and machinery to another company as removal as such?

3. Whether the power plant and the inputs, capital goods and input services used in the said power plant could be said to be an integral part of the factory of the assessee to be eligible inputs, capital goods and input services as defined in Rule 2 (a), Rule 2 (k) and 2 (1) of the Cenvat Credit Rules, 2004, even after the lease resulting in transfer of the power plant from the possession and use of the assessee to another company?

C.M.A. No.3421/2008

1. Whether the inputs and capital goods used in a power plant and on which Cenvat credit of duty had been taken could be deemed as removed as such in terms of the provisions of Rule 3 (5) of the Cenvat Credit Rules, 2004, when the right to use the said power plant along with the land, building, plant and machinery were leased by the assessee for consideration to another company?

2. Whether on such lease the assessee shall have to pay an amount equal to the credit availed in respect of such inputs or capital goods in terms of Rule 3 (5) of the Cenvat Credit Rules, 2004, deeming the transfer of the right to use the said power plant comprising the land, building, plant and machinery to another company as removal as such and consequently, be liable to pay an equal amount of penalty under Section 11AC of the Central Excise Act, 1944 for consciously suppressing the fact of removal of power plant by way of lease?

3. Whether the power plant and the inputs, capital goods and input services used in the said power plant could be said to be an integral part of the factory of the assessee to be eligible inputs, capital goods

and input services as defined in Rule 2 (a), Rule 2 (k) and 2 (1) of the Cenvat Credit Rules, 2004, even after the lease resulting in transfer of the power plant from the possession and use of the assessee to another company?"

2. The brief facts, as could be culled out from the order of the Tribunal, are as hereunder :-

The respondent/assessee is engaged in the manufacture of cement, for which they are registered with the department. The assessee is also registered with the department and assessed to service tax. The assessee availed cenvat credit on capital goods, inputs and input services and utilised the same for payment of duty on the final product, viz., cement. During the period between March, 2004 and March, 2005, a power plant was set up by the assessee within their factory premises for which they took cenvat credit on the duty paid on inputs and capital goods received in their factory in relation to the setting up of the power plant. The credit availed by the assessee was utilised for payment of duty on cement. The department conducted investigation and on scrutiny of the records, found that the said power plant was leased out by the assessee Dalmia Cements Ltd., (for short 'DCL') to M/s.Keshav Power Pvt. Ltd. (for short 'KPPL') under a lease deed dated 24.3.05 with retrospective effect from 15.3.2005. The entire land, including the land measuring 5.38 acres, with ancillary machinery and equipments were leased out. The lease period was for 10 years. As per the lease deed, KPPL was to pay a monthly rent of Rs.18,37,500/= to DCL. On termination of the lease, KPPL were to hand over physical possession of the property to DCL. The lease further provided that it was the liability of KPPL to obtain all consents, licences, approvals, etc., as are necessary for the execution, validity and enforceability of the lease deed and for the operation of the power plant and also to keep them effective in force during the lease period. It further provided that DCL was not liable for any loss, damage or claim of any kind arising from the operation/maintenance of the power plant. KPPL were liable to maintain proper insurance for the power plant against all risks including fire, lightning, explosion, earthquake, storm, flood, theft, etc. DCL also entered into a power purchase agreement with KPPL on 24.3.05 according to which the fuel required for the power plant would be supplied free by DCL and the power generated by the plant would be supplied to DCL by KPPL for which DCL would pay at the prescribed tariff. The power purchase agreement further provided that KPPL should not supply power to any third party without prior written consent of DCL. It also stipulated the terms and conditions for supply of fuel by DCL and for operation and maintenance of the power plant by KPPL. A Memorandum of Understanding dated 28.3.05 was executed between the two companies, which provided that DCL would continue to retain control over the power plant; that the ownership of the fuel supplied by DCL to KPPL for power generation would, at

all times, remain with DCL and that the residual fly-ash from the power plant would also belong to DCL. In the course of investigation, statement of the Executive Director of DCL was recorded by the Department, who in his statement admitted the above facts and claimed that the ownership of the power plant vested with DCL. The further statement reveals that DCL had leased out the power plant to KPPL, on account of their technical capabilities to run the plant. It was also stated that the lease deed was registered under the provisions of the Transfer of Property Act. In the course of investigation, DCL, under protest, paid an amount of Rs.6,84,82,078/= partly from cenvat credit account and partly from PLA.

3. Further to the investigations, the department issued a show cause notice dated 5.4.06 to DCL seeking to recover the following :-

(a) an amount of Rs.7,05,03,828/= (consisting of Cenvat Credit of Rs.6,94,14,477/= and Education Cess of Cr.10,89,351/=), being the total amount of alleged inadmissible credit availed by DCL on capital goods, inputs and input services during the period from March, 2004 to March, 2006;

(b) appropriate the payments already made towards such demand;

(c) levy interest on the above amount; and

(d) impose penalty.

4. The above demand was made on the allegation that DCL, by leasing out the power plant with ancillary equipments to KPPL, removed from their factory the capital goods and inputs used for setting up the power plant and, consequently, in terms of Rule 3 (5) of the Cenvat Credit Rules, 2004, (for short 'CCR, 2004') they were liable to pay an amount equal to the credit taken on such capital inputs and capital goods. It was also alleged that the credit taken on input services used in the setting up of the power plant, which was subsequently transferred to KPPL, was also inadmissible. The extended period of limitation was invoked in the show cause notice alleging that DCL had suppressed the lease of the power plant with an intention to evade payment of the amount required under Rule 3 (5) of the CCR, 2004.

5. The allegations raised in the show cause notice were denied by DCL and it contested the matter. After adjudication of the matter, the adjudicating authority confirmed the demand to the extent of Rs.6,97,31,863/=, appropriated the payments already made by DCL towards the above demand and levied interest at appropriate rates and a penalty of Rs.12.5 Lakhs under Section 11AC of the Central Excise Act read with Rule 15 of the Cenvat Credit Rules, 2004, was levied on DCL. The adjudicating authority, viz., the Commissioner, took the view that the power plant and the land on which the power plant is situate has been transferred by way of lease deed to KPPL and,

therefore, the power plant ceased to be part of the assessee and stood excluded from the factory premises and, thereby, provisions of Rule 3 (5) of the Cenvat Credit Rules, 2004, is attracted.

6. Aggrieved against the said order, the assessee/2nd respondent as well as the appellant/Revenue pursued the matter before the Tribunal, vide separate appeals. The assessee, before the Tribunal, raised the following contentions :-

"a) The Cenvat Credit validly availed and utilised by them cannot be denied on the basis of a subsequent lease of the power plant.

b) The power plant is a captive power plant, completely integrated with the process of manufacture of cement inasmuch as even after lease to KPPL, it continued to produce and supply power to the cement manufacturing plant of DCL. All the raw materials required for the generation of electricity in the plant were supplied by the assessee to KPPL and the entire electricity generated by KPPL was supplied to the assessee for the manufacture of cement.

c) There is no physical removal of capital goods or inputs from the assessee's factory, since the power plant remained within the factory premises as indicated by the ground plan even after lease to KPPL. Physical removal of capital goods and inputs from the factory is necessary to attract Rule 3 (5) of the Cenvat Credit Rules, 2004, which is missing in this case.

d) CCR, 2004 has no provision covering transfer of capital goods on lease and, therefore, neither the Department nor the Courts can deem such provision to the detriment of the assessee.

e) Ownership is immaterial for availment of Cenvat Credit, as has been propounded in a series of cases.

f) Rule 3 (5) of the CCR, 2004, speaks only about removal of inputs and capital goods as such from factory and is silent about input services. The demand for reversal of credit on input services under the above provision is, therefore, not justifiable.

g) The Commissioner erred in relying on the Tribunal's decision in Majestic Auto Ltd. - Vs - CCE, Ghaziabad (2004 (173) ELT 145 (Tri. Del.)), which case is distinguishable on facts.

h) The department had been informed by DCL about its proposal to set up a captive power plant and revised ground plan was also submitted incorporating the cement plant and power plant. There was no suppression of any relevant fact by DCL nor there was any intention to evade payment of any amount as

provided under Rule 3 (5).

DCL contended that it was their bona fide belief that they were entitled to avail the credit, irrespective of their transactions with KPPL under the lease deed and, therefore, the extended period of limitation cannot be invoked against them and the entire demand is liable to be set aside as barred by limitation."

7. On the above stated contention, the Tribunal, on facts, came to the conclusion that the 2nd respondent/assessee had set up a captive power plant and leased out the same to another company, viz., KPPL, w.e.f. 15.3.05 for generation of electricity and supply thereof to the assessee at the prescribed rates. The moot question that arose for consideration before the Tribunal was "whether such a leasing of the power plant by DCL to KPPL under the lease agreement could be termed as 'removal of capital goods' as such from the assessee's factory, enabling the department to make the demand as aforesaid?"

8. The Tribunal, on consideration of the entire gamut of facts and referring to another decision of its own in the case of BLIT Industrial Packaging Company Ltd. - Vs - CCE, Salem (2007 (216 ELT 217 (Tri. Che.)) where a similar provision, viz., Rule 3 (4) of the Cenvat Credit Rules, 2003, was considered and held in favour of the assessee, decided the present case holding that there was no physical removal of capital goods as such from the factory. There was no invoice issued as envisaged under Rule 11 (1) of CCR, 2002 read with Rule 3 (5) of CCR, 2004, for clearance of any capital goods as such from DCL factory. The Tribunal held that the provisions of Rule 3 (5) of CCR, 2004, is not applicable to the instant case. In such view of the matter, the issue was answered in favour of the assessee and against the Revenue. The Revenue, aggrieved by the said order of the Tribunal is before this Court by filing the present appeals.

9. Heard the learned standing counsel appearing for the appellant/Revenue and the learned counsel appearing for the 2nd respondent/assessee and perused the materials available on record as also the decisions relied on by the learned counsel for the parties on which reliance has been placed by the Tribunal in arriving at its conclusion.

10. Since the whole issue relates to the interpretation of Rule 3 (5) and 9 of CCR, 2004 and Rule 11 (1) of CCR, 2002, for better clarity, Rule 3 (5) and Rule 9 of the CCR, 2004 and Rule 11 (1) of the CCR, 2002, are extracted hereinbelow :-

"Rule 3 (5) of CCR, 2004

3.

(5) When inputs or capital goods, on which CENVAT

credit has been taken, are removed as such from the factory, or premises of the provider of output service, the manufacturer of the final products or provider of output service, as the case may be, shall pay an amount equal to the credit availed in respect of such inputs or capital goods and such removal shall be made under the cover of an invoice referred to in rule 9:

Provided that such payment shall not be required to be made where any inputs are removed outside the premises of the provider of output service for providing the output service:

Provided further that such payment shall not be required to be made when any capital goods are removed outside the premises of the provider of output service for providing the output service and the capital goods are brought back to the premises within 180 days, or such extended period not exceeding 180 days as may be permitted by the jurisdictional Deputy Commissioner of Central Excise, or Assistant Commissioner of Central Excise, as the case may be, of their removal.

Rule 9 of CCR, 2004

9. Documents and accounts.- (1) The CENVAT credit shall be taken by the manufacturer or the provider of output service or input service distributor, as the case may be, on the basis of any of the following documents, namely :-

- (a) an invoice issued by -
 - (i) a manufacturer for clearance of -
 - (I) inputs or capital goods from his factory or depot or from the premises of the consignment agent of the said manufacturer or from any other premises from where the goods are sold by or on behalf of the said manufacturer;
 - (II) inputs or capital goods as such;
 - (ii) an importer;
 - (iii) an importer from his depot or from the premises of the consignment agent of the said importer if the said depot or the premises, as the case may be, is registered in terms of the provisions of Central Excise Rules, 2002;
 - (iv) a first stage dealer or a second stage dealer, as the case may be, in terms of the provisions of Central Excise Rules, 2002; or
- (b) a supplementary invoice, issued by a manufacturer or importer of inputs or capital goods in terms of the provisions of Central Excise Rules,

2002 from his factory or depot or from the premises of the consignment agent of the said manufacturer or importer or from any other premises from where the goods are sold by, or on behalf of, the said manufacturer or importer, in case additional amount of excise duties or additional duty leviable under section 3 of the Customs Tariff Act, has been paid, except where the additional amount of duty became recoverable from the manufacturer or importer of inputs or capital goods on account of any non-levy or short -levy by reason of fraud, collusion or any wilful misstatement or suppression of facts or contravention of any provisions of the Excise Act, or of the Customs Act, 1962 (52 of 1962) or the rules made there under with intent to evade payment of duty.

Explanation.- For removal of doubts, it is clarified that supplementary invoice shall also include challan or any other similar document evidencing payment of additional amount of additional duty leviable under section 3 of the Customs Tariff Act; or

(c) a bill of entry; or

(d) a certificate issued by an appraiser of customs in respect of goods imported through a Foreign Post Office; or

(e) a challan evidencing payment of service tax by the person liable to pay service tax under subclauses (iii) and (iv) of clause (d) of sub-rule (1) of rule (2) of the Service Tax Rules, 1994; or

(f) an invoice, a bill or challan issued by a provider of input service on or after the 10th day of September, 2004; or

(g) an invoice, bill or challan issued by an input service distributor under rule 4A of the Service Tax Rules, 1994.

Rule 11 of CCR, 2002

Rule 11. Goods to be removed on invoice.- (1) No excisable goods shall be removed from a factory or a warehouse except under an invoice signed by the owner of the factory or his authorised agent and in the case of cigarettes, each such invoice shall also be countersigned by the Inspector of Central Excise or the Superintendent of Central Excise before the cigarettes are removed from the factory.

Provided that a manufacturer of yarns or fabrics falling under Chapter 50, 51, 52, 53, 54, 55, 58 or 60 or readymade garments falling under Chapter 61 or

62 of First Schedule to the Tariff Act may remove the said goods under a proforma invoice signed by him or his authorised agent. The provisions of sub-rules (2) to (5) shall apply to the proforma invoice except that the said invoice shall not contain the details of the duty payable. The manufacturer shall, within five working days from the issuance of the proforma invoice prepare the invoice in terms of this rule after making adjustments in respect of the goods rejected and returned by the buyer. The proforma invoice and the invoice issued in terms of this sub-rule shall have cross reference to each other by way of their serial numbers.

Provided further that the said period of five working days, as referred to in the first proviso, may be extended upto a period not exceeding twenty-one days, inclusive of the said period of five working days, by the Commissioner of Central Excise, on receipt of a request from the said manufacturer.

(2) The invoice shall be serially numbered and shall contain the registration number, address of the concerned Central Excise Division, name of the consignee, description, classification, time and date of removal, mode of transport and vehicle registration number, rate of duty, quantity and value of goods and the duty payable thereon.

Provided that in case of a proprietary concern or a business owned by Hindu Undivided Family, the name of the proprietor or Hindu Undivided Family, as the case may be, shall also be mentioned in the invoice.

(3) The invoice shall be prepared in triplicate in the following manner, namely :-

(i) the original copy being marked ORIGINAL FOR BUYER.

(ii) the duplicate copy being marked as DUPLICATE FOR TRANSPORTER.

(iii) the triplicate copy being marked as TRIPLICATE FOR ASSESSEE.

(4) Only one copy of invoice book shall be in use at a time, unless otherwise allowed by the Assistant Commissioner of Central Excise, or the Deputy Commissioner of Central Excise, as the case may be, in the special facts and circumstances of each case.

(5) The owner or working partner or the Managing director or the Company Secretary or any person duly authorised for this purpose shall authenticate each foil of the invoice book, before being brought into use.

(6) Before making use of the invoice book, the

serial numbers of the same shall be intimated to the Superintendent of Central Excise having jurisdiction.

(7) The provisions of this rule shall apply mutatis mutandis to goods supplied by a first stage dealer or a second stage dealer:

Provided that in case of the first stage dealer receiving imported goods under an invoice bearing an indication that the credit of additional duty of customs levied on the said goods under sub-section (5) of section 3 of the Customs Tariff Act, 1975 (51 of 1975) shall not be admissible, the said dealer shall on the resale of the said imported goods, indicate on the invoice issued by him that no credit of the additional duty levied under sub-section (5) of section 3 of the Customs Tariff Act, 1975 shall be admissible.

Provided further that in case of the second stage dealer receiving imported goods under an invoice bearing an indication that the credit of additional duty of customs levied on the said goods under sub-section (5) of section 3 of the Customs Tariff Act, 1975 (51 of 1975) shall not be admissible, the said dealer shall on the resale of such imported goods, indicate on the invoice issued by him that no credit of the additional duty levied under sub-section (5) of section 3 of the Customs Tariff Act, 1975 shall be admissible.

Explanation. - For the purposes of this rule, "first stage dealer" and "second stage dealer" shall have the meaning assigned to them in CENVAT Credit Rules, 2002."

11. Keeping the above rule position in mind, this Court proceeded to analyse the case of the assessee as revealed by the records.

12. While the adjudicating Commissioner relied upon the decision in Majestic Auto case (supra), the Tribunal, however, distinguished that decision placing reliance on the decision of the Supreme Court in the case of J.K. Spinning & Weaving Mills - Vs - Union of India (1987 (32) ELT 234 (SC)).

13. The Tribunal also relied upon the decision of the Supreme Court in Shyam Oil Cake Ltd. - Vs - CCE, Jaipur (2004 (174) ELT 145 (SC)) to buttress its view that the deeming provision should be expressed in the language of the particular provision and since there is no deeming provision in Rule 3 (5) of the Cenvat Credit Rules, 2004, the Department cannot attribute the cost of removal in a transaction covered by a lease agreement.

14. On facts, the Tribunal went in detail into the lease deed, the terms and conditions of the lease and the various clauses to come to the conclusion that there was no removal of goods as such from the premises of DCL and, therefore, held that the order of the adjudicating Commissioner is bad. The reasoning of the Tribunal, in the considered opinion of this Court, is a well considered reasoning and this Court finds no reason to differ with the view of the Tribunal, as we have considered the contentions and findings in extenso. The decisions relied on by the Tribunal in arriving at the above decision is also well founded and, therefore, this Court does not find any reason to interfere with the same.

15. On the questions of law framed above, at the outset, it is brought to the notice of this Court that the decision of Majestic Auto case (supra), which was relied upon by the jurisdictional Commissioner has since been reversed by the Allahabad High Court in Hero Motors Ltd. - Vs - Commissioner of Central Excise, Ghaziabad (2014 (310) ELT 729 (All.)). A cursory glance at the said decision would reveal that the case was also a case of lease and in the said case also the capital goods remained installed in the same premises and in the said circumstances, the Allahabad High Court held as under :-

"22. In the present case we find substance in the contention of Shri Bharat Ji Agarwal that at the time of obtaining registration HBSA Pvt. Ltd. had submitted a ground lay out plan, which was approved by the Superintendent, Customs and Central Excise, Range-6, Division-III, Ghaziabad on 21-8-1998 and in which the engine assembly on ground floor in the premises of Majestic Auto Limited was clearly demarcated. The plant and machinery was installed and was never removed from the premises. The I.C. Engines manufactured by HBSA Pvt. Ltd. in the same premises were used by the appellant. Once it was admitted that the capital goods, on which Modvat Credit was taken by the appellant remained installed in the same premises, which was leased out and continued to be engaged in the manufacture of I.C. Engine, which was further used in the manufacture of two wheelers and that a separate registration certificate was obtained by HBSA Pvt. Ltd., there was no removal of goods. The capital goods remained installed in the same premises and thus even if the premises were transferred on lease, the capital goods even if they were deemed to be installed in the premises of HBSA Pvt. Ltd., Rule 57-S, would not be attracted."

16. On a plain reading of Rule 3 (5) of the Cenvat Credit Rules, 2004, we find that Rule 3 (5) only speaks about the removal of goods

under cover of invoice referred to in Rule 9 on inputs or capital goods on which cenvat credit has been taken and if such goods are removed as such from the factory or premises of the provider of output service, the manufacturer of the final products or provider of output service, shall be liable to pay an amount equal to the credit availed in respect of such inputs or capital goods.

17. In this case, we find there is no removal of goods under cover of invoice as provided under Rule 9 of the Cenvat Credit Rules, 2004 and there is nothing in Rule 3 (5) of the Cenvat Credit Rules, 2004 to invoke the deeming fiction as insisted by the adjudicating authority. The language of Rule 3 (5) is plain and simple. When the inputs or capital goods on which cenvat credit has been taken are removed as such from the factory, then subject to compliance of other requirements, the credit availed in respect of inputs on capital goods shall be paid. This situation has not arisen in the present case, as no invoice has been issued for removal of the goods from the factory premises and, therefore, the said rule is not applicable to the case of the assessee.

18. The above is the view succinctly expressed by the Allahabad High Court in Hero Motors case (supra). This Court is in agreement with the view expressed by the Allahabad High Court in the above-cited decision and the above decision is squarely applicable to the facts of the present case. In view of the above, the interpretation with regard to Rule 3 (5) of CCR, 2004, as made by the Tribunal in the present case is fully justified and it calls for no interference at the hands of this Court.

19. For the foregoing reasons, we find no reason to interfere with the well considered findings of the Tribunal on the questions of law as raised above. Accordingly, the substantial questions of law are answered in favour of the 2nd respondent/assessee and against the appellant/Revenue.

20. In the result, finding no merits warranting interference with the order of the Tribunal, these appeals are dismissed. However, in the circumstances of the case, there shall be no order as to costs.

Sd/-

Assistant Registrar (CS II)

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Sub Assistant Registrar

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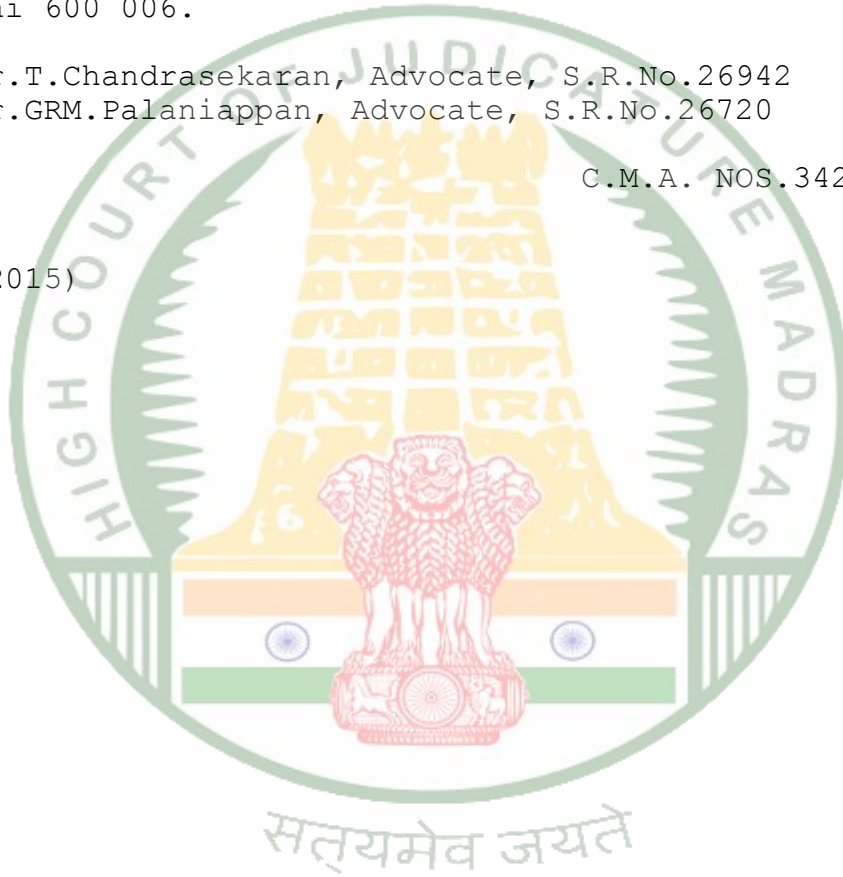
To

1. The Commissioner of Central Excise
Central Excise Commissionerate
No.1, Williams Road
Tiruchirappalli 620 001.
2. Customs, Excise & Service
Tax Appellate Tribunal
Shastri Bhavan Annexe
No.26, Haddows Road
Chennai 600 006.

+1cc to Mr.T.Chandrasekaran, Advocate, S.R.No.26942
+1cc to Mr.GRM.Palaniappan, Advocate, S.R.No.26720

C.M.A. NOS.3420 & 3421 OF 2008

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