

IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA PRADESH

C.E.A. No. 107 of 2015

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Between:

The Commissioner of Customs,
Central Excise & Service Tax .. Appellant

And

M/s.Bharat Dynamics Ltd. .. Respondent

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JUDGMENT PRONOUNCED ON: 08.10.2015

HON'BLE SRI JUSTICE : HON'BLE SRI JUSTICE G.CHANDRAIAH

AND

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HON'BLE SRI JUSTICE: HON'BLE SRI JUSTICE CHALLA KODANDA RAM

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1. Whether Reporters of Local newspapers Yes/No
may be allowed to see the judgments?

2. Whether the copies of judgment may be Yes

marked to Law Reporters/Journals

3. Whether Their Ladyship/Lordship wish to Yes/No

see the fair copy of the judgment?

***HON'BLE SRI JUSTICE G. CHANDRAIAH**

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HON'BLE SRI JUSTICE CHALLA KODANDA RAM

+C.E.A. No. 107 of 2015

%08-10-2015

The Commissioner of Customs

Central Excise & Service TaxAppellant

Vs.

\$ M/s.Bharat Dynamics Ltd. Respondent

!Counsel for the Appellant: Ms.P.Sarada, Senior SC for Customs and

Central Excise

Counsel for Respondent: N.A

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>Head Note:

? Cases referred:

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JUDGMENT:- (per Hon'ble Sri Justice G. Chandraiah)

This Central Excise Appeal under Section 35(G) of the Central Excise Act, 1944 is filed at the instance of the Department against the Final Order dated 22.10.2013 passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Bangalore (for short "the Tribunal") by raising the following questions of law for adjudication.

- i. Whether Cenvat Credit on "inputs used in manufacture of exempted goods", which is specifically not allowed by the statutory provision vide Rule 6(1) of Cenvat Credit Rules, 2004, can be held as "not wrongly taken", going by extraneous facts and circumstances, as done by the Hon'ble Tribunal in the instant case?
- ii. Whether, when it is an admitted and undisputed fact of the case that the Credit taken by the respondents was not eligible to be taken in view of Rule 6(1), the interest liability thereon could be waived by the Hon'ble Tribunal by holding that the Credit was not wrongly taken and disregarding the Hon'ble Supreme Court's decision in Ind-Swift Laboratories Ltd.?
- iii. Whether the Hon'ble Tribunal, Bangalore Bench was correct and justified in allowing the respondent's appeal with consequential relief, in the instant case by holding that the Credit was not wrongly taken, despite the respondent's own admission that the Credit was not eligible to them and that the dispute was only with regard to the interest liability thereon?

The brief facts of the case are that the respondent – M/s.Bharat Dynamics Limited, who manufactured Pistols, Missiles and Rocket Motor Tubes falling under chapter Heading No. 93020000 and 93069000 of the Central Excise Tariff Act, 1985, is working under the Ministry of Defence. In terms of Sl.No.2 of the Notification No.63/95-Central Excise dated

16-03-1995, as amended, all goods, if manufactured by

M/s. B.D.L. i.e. the respondent – assessee for supply to the Ministry

of Defence for official purpose are fully exempted from payment of central excise duty. While so, a Show Cause Notice dated 07-05-2012 was issued to the assessee alleging that they have taken ineligible and irregular Cenvat Credit on inputs which were used in the manufacture of exempted goods. Thereafter, the Commissioner of Customs, Central Excise and Service Tax, Hyderabad-II Commissionerate, Hyderabad, vide Order-in-Original dated 30-11-2012, confirmed the demand of Cenvat Credit of Rs.5,85,51,697/- by holding the same to be irregular in terms of Rule 6(1) of Cenvat Credit Rules, 2004 (for short "the Rules"). Demand of interest on that amount was also confirmed in terms of Rule 14 of the Rules read with Section 11AB of the Central Excise Act, 1944 (for brevity "the Act"), however no penalty was imposed by the adjudicating authority. Aggrieved by the Order-in-Original, the assessee filed an appeal, and the Tribunal, by its Final Order dated 22-10-2013, allowed the appeal. Challenging the order of the appellate authority, the Department has preferred the present appeal.

Ms. P. Sarada, learned senior Standing Counsel for Customs and Central Excise, has strenuously contended that the only dispute before the Tribunal was with regard to the demand of interest on the irregularly taken Cenvat credit and the respondent-assessee did not dispute the ineligibility of the Credit nor made any plea nor justified as to the correctness of the Credit taken, but only contended for setting aside the liability of interest on the Credit amount on the ground that the Credit amount, in major part, has not been utilized by them and the same has been reversed, however the Tribunal has traversed beyond the scope of the dispute before it by holding that the credit was not wrongly taken by the assessee. She has further contended that Cenvat credit was undisputedly taken wrongly by the respondent-assessee contrary to the statutory provision of Rule 6(1) of the Rules, as such, they are liable to pay interest thereon from the date of taking such credit in terms of Rule 14 of the Rules. While submitting a clear and categorical ruling on the issue as to whether interest is payable on wrongly taken Cenvat credit even where it is

not utilized and that the interest liability arises from the date of 'taking' such irregular credit, are observed in the judgment of the Apex Court in the case of **Union of India Vs. Ind-swift Laboratories Ltd., (2011 (265) ELT 3 SC)**, she has contended that the Tribunal erred in waiving the liability of interest. The appellant has also contended that the Tribunal was not correct in justifying that the credit was not taken wrongly by placing more importance to the "circumstances" under which the assessee had taken the credit. Those "circumstances", in any case, cannot have weightage to the extent of over-riding a statutory provision barring the taking of credit on inputs used in exempted goods.

We have heard the learned senior Standing Counsel for Customs and Excise appearing for the appellant and perused the material placed on record.

The Tribunal, in its order dated 22.10.2013, has recorded the following findings:

"In our opinion, the appellant has definitely a case for seeking clarification from the department. In March, 2010, the appellant sought clarification from the department to know whether the clearance of goods to M/s.B.E.L. are exempted from payment of excise duty in terms of notification. In the absence of clarification from the department, they took CENVAT credit during the intervening period i.e. from September, 2010 to March, 2011. They had to take Cenvat credit in September, 2010 since some of the job workers did not return all the inputs within 180 days and they had to reverse the credit. To reverse the credit, they had to take credit. When there was no clarification received from the department till March, 2011, the assessee had no option but to clear two consignments in March, 2011 on payment of excise duty of Rs.90,94,851/- by utilizing the Cenvat Credit. On getting the clarification from TRU in April, 2011, the appellant reversed the entire amount of Cenvat credit.

In the above circumstances, the only question arises whether in terms of Rule 14 of the Cenvat Credit Rules, 2004, the appellant can be said to have taken credit wrongly. When the credit was not taken wrongly, the question of payment of interest does not arise. In this case, the circumstances discussed above show that the appellant could not have acted any other way than the way they did. In the circumstances, holding that credit was not admissible and was taken without eligibility and therefore asking them to pay interest was not correct. Moreover, any assessee, if he has any doubt, has a right to ask the department and such action is not contrary to the provisions of law. Further, in the circumstances of this case, it cannot be said that the credit had been

taken by the appellant wrongly. When credit is not taken wrongly, the question of payment of interest does not arise in terms of provisions of Rule 14 of C.C.R. 2004. In these circumstances, we do not find that the appellant is liable to pay interest since credit taken by them is not wrong in the first place. In the result, appeal is allowed with consequential relief, if any, to the appellant.”

From the findings arrived at by the Tribunal as reproduced above, it is obvious that in March, 2010, the appellant in accordance with the relevant provision of law, did seek clarification from the department to know whether the goods on clearance to the respondent-assessee are exempted from payment of excise duty in terms of the Notification and only in the absence of such clarification from the department, they took CENVAT credit during the intervening period i.e. from September, 2010 to March, 2011. It is also clearly observed that after getting clarification from TRU in April, 2011, the appellant reversed the entire amount of Cenvat credit. In that view of the matter, the specific contention put forth by the learned Standing Counsel that the respondent-assessee, without any eligibility, has taken the Cenvat credit, as such, they are liable to pay interest, is not sustainable.

In view of the categorical findings of fact recorded by the Tribunal and there being no material to disprove those findings, we are of the considered opinion that there is no perversity in the order of the Tribunal and it is purely a question of fact and there is no question of law much less substantial question of law warranting interference by this Court.

Hence, the Central Excise Appeal is devoid of merits and dismissed. No order as to costs.

As a sequel to dismissal of the appeal, Miscellaneous Petitions, if any pending, shall stand disposed of as infructuous.

G. CHANDRAIAH, J

08.10.2015

CHALLA KODANDA RAM,J

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