IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 21.10.2016

CORAM:

THE HON'BLE MR.JUSTICE NOOTY RAMAMOHANA RAO
&
THE HONOURABLE DR.JUSTICE ANITA SUMANTH

C.M.A.No.2187 of 2016

The Commissioner of Central Excise,
No.1, Foulks Compound,
Anai Medu,
Salem 636 001. ... Appellant

Versus

M/s.Madras Aluminium Company Limited,
Mettur Dam RS,
Mettur Dam-636 402. ... Respondent

Civil Miscellaneous Appeal filed under Section 35G of the Central Excise Act, 1944 praying to set aside the order of the Customs Excise and Service Tax Appellate Tribunal passed in Final Order No.41186/2015 dated 4.9.2015 and restore the order-in-original.

For Appellant : Mr.V.Sundareswaran
For Respondent : Mr. Raghavan Ramabadhran
for Mr.Lakshmi Kumaran

J U D G M E N T

(Judgment of the Court was delivered by NOOTY RAMAMOHANA RAO J.)

This appeal preferred under section 35G of the Central Excise Act 1944, by the Revenue is directed against a very short order passed by the Customs, Excise and Service Tax Appellate Tribunal on 4th September, 2015, in Final Order No.41186 of 2015.

2. The respondent has preferred the said appeal before the tribunal without raising any dispute with regard to the duty liable to be paid and the interest that is also paid thereon. The only dispute which has been raised for the purpose of adjudication was the justification for imposition of penalty in a sum of Rs.29,58,725/- in terms and in accordance with section 11AC of the Central Excise Act, (hereinafter referred to as 'Act'). The tribunal has recorded its findings on fact that there is no material on record to demonstrate that the appellant deliberately caused prejudice to the revenue and out of a confusion that persisted for a long time that prevented the appellant to settle the duty. In those state of circumstances, the tribunal had come to the conclusion that imposition of penalty is liable to be waived.

3. The essential facts, which trigerred the action of drawing show cause notice dated 4.4.2012, by the Additional Commissioner, are: The respondent who is engaged in the manufacture of Calcined Alumina, Aluminium Ingots etc was found to have availed CENVAT credit on certain items such as MS channel, Angles, plates, etc, which are falling under Chapter 72 of Central Excise Tariff Act 1985. As soon as audit objection has been communicated on 19.08.2009 requiring them to reverse the credit, the respondent has reversed the credit in a sum of Rs.1,59,62,412/- effecting the consequential payments through Challan dated 8.2.2010.

4. They have also effected the payment of interest in a sum of Rs.25,63,239/- pursuant to the demand raised in this regard on 31.8.2000 for the time consumed for reversing the credit availed. Therefore the whole question centers around whether the conduct at the first instance in availing the CENVAT credit by the respondent is a bonafide one or not?

5. CENVAT credit Rules 2004 have defined the various expressions found therein in Rule 2 thereto. The expression "Capital

Goods" has been defined as under:

> "capital goods" means:-
>
> (A) the following goods, namely:-
>
> (i) all goods falling under Chapter 82, Chapter 84, Chapter 85, Chapter 90, heading No.6805, grinding wheels and the like and parts thereof falling under heading 6804 of the First Schedule to the Excise Tariff Act;
>
> (ii) Pollution control equipment;
>
> (iii) Components, spares and accessories of the goods specified at (i) and (ii);
>
> (iv) moulds and dies, jigs and fixtures;
>
> (v) refractories and refractory materials;
>
> (vi) tubes and pipes and fittings thereof; and
>
> (vii) storage tank, used;
>
> (1) in the factory of the manufacturer of the final products, but does not include any equipment or appliance used in an office;"

6. From a perusal of the above, it makes clear that such goods which fall under Chapter 82, 84, 85 and 90 and headings No.90, 68.05 etc., answer the description of Capital Goods. Similarly pollution control equipment also answers the description of Capital Goods. But However, the following which is found in the definition

has some significance for the question that has engaged our attention. It reads as under;

"Components, spares and accessories of the goods specified at (1) above."

While there is no difficulty for one to understand what constitutes components or spares of certain equipments, but the expression "accessories" is not free from any doubt. The expression "accessories" is normally understood as a thing which could be added to some thing else in order to make the former more useful, versatile or attractive. The show cause notice dated 4.4.2012 had enclosed thereto, an annexure listing out the equipments, for which the CENVAT credit has been initially taken by the respondent together with their usages. When we peruse the tabulated statement, in particular with regard to their usage, we have noticed that steel plates have been used by the respondent for supporting the other essential equipments such as HP/LP Heaters, Grider of cranes, cable trenching covering and also for covering the hot area of the boiler.

7. The claim of the respondent was that it has undertaken construction of the 4th unit of a captive power plant. In that process,

it has utilized this material and "construed" them as "accessories". We could also notice that the MS angles have been used as a support structure either for construction of a platform or for ladders. Going by the common understanding of the expression 'accessories', we are of the view that the notion entertained by the respondent that the MS plates and MS angles utilised by it at the first instance for CENVAT credit are only intended to enhance the effective utilisation of the other equipment which is needed to be put in place for their 4th unit of the captive power plant. Such an impression that MS Plates and MS Angles can be used as accessories is not a totally absurd view.

8. When such is the scenario, whether it amounts to a suppression of fact at the first instance is required to be deciphered in view of the language employed in Section 11 AC of the Act, which reads as under;

> "Section 11AC. Penalty for short-levy or non-levy of duty in certain cases. - Where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reasons of fraud, collusion or any willful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules

> made thereunder with intent to evade payment of duty, the person who is liable to pay duty as determined under sub-section (2) of section 11A, shall also be liable to pay a penalty equal to the duty so determined."

9. In fact, it is worthy to notice that the expression "suppression" has fallen for consideration of the Supreme Court in ***Continental Foundation Jt.Venture v. Commissioner of Central Excise, 2007(216) E.L.T.177,*** wherein, it was set out that "mere omission to give correct information is not suppression of facts unless it was deliberate to stop the payment of duty. Suppression means failure to disclose full information with the intent to evade payment of duty. When the facts are known to both the parties, omission by one party to do what he might have done would not render it suppression".

10. Further, once again a similar issue has engaged the attention of Supreme Court in **Cosmic Dye Chemical V. CCE, Bombay (1995 (75) E.L.T 721 (S.C.),** wherein it was clearly brought out as under:

> "6. Now so far as fraud and collusion are concerned, it

> is evident that the requisite intent, i.e., intent to evade duty is built into these very words. So far as mis-statement or suppression of facts are concerned, they are clearly qualified by the word "wilful" preceding the words "mis-statement or suppression of facts" which means with intent to evade duty. The next set of words "contravention of any of the provisions of this Act or Rules" are again qualified by the immediately following words "with intent to evade payment of duty". It is, therefore, not correct to say that there can be a suppression of mis-statement of fact, which is not wilful and yet constitutes a permissible ground for the purpose of the proviso to Section 11A. Mis-statement or suppression of fact must be willful."

11. In view of the settled legal principle, for the penalty to be imposed, the alleged suppression of fact must <u>necessarily be coupled with intent to evade payment of duty.</u> As we have already noticed supra, MS plates and MS angles have been used as accessories of other equipments to make such equipments to be used more effectively. When once the audit has raised an objection on the ground that MS plates and MS angles fall under chapter 72 of the Tariff Act, but not under chapters 82, 84,85 or 90, the respondent has reversed the credit availed. The respondent has reversed it, no

doubt, on its own, because of unavailability of adequate quantity of Bauxite. Be that as it may. It has also paid the interest for the delayed part of reversing the credit.

12. From the above facts and circumstances, it is evident that there is no willful intent to evade duty and hence the question of invoking the penalty under section 11AC would not arise. The view taken by the Tribunal appears to be a reasonable one.

13. For the afore mentioned reasons, we find no error committed by the tribunal in its order and accordingly we dismiss this appeal, but however, no order as to costs.

[N.R.R.J.,] [A.S.M.J.,]
21.10.2016

msr
Index:Yes/No
Internet:Yes/No

To
The Customs Excise and Service Tax Appellate Tribunal,
Chennai.

NOOTY RAMAMOHANA RAO, J.
&
Dr. ANITA SUMANTH, J.

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