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

CENTRAL EXCISE APPEAL NO. 173 OF 2008
WITH
CENTRAL EXCISE APPEAL NO. 109 OF 2007

The Commissioner of Central Excise
Customs & Service Tax … Appellant in both the Appeals

Versus

M/s. Ispat Industries Limited … Respondent both the Appeals

Mr. Swapnil Bangur, i/b Ms. Shalakha A. Gujar for Appellant.

Mr. Vipin Kumar Jain,with Mr. Ashutosh Mishra & Mr. Akshit Malhotra & Mr. P.K. Shetty for Respondent.

CORAM : A.S. OKA AND
RIYAZ I. CHAGLA, JJ.

DATED : 26th & 27th SEPTEMBER, 2017

ORAL JUDGMENT (Per A.S. Oka, J.)

1 The submissions of the learned counsel appearing for the parties were heard on the earlier date.

2 Both the Appeals have been admitted. Appeal No.109 of 2007 was admitted on 23rd July, 2008 by framing following substantial questions of law:

"1. Whether the Modvat Credit availed by M/s. Ispat Industries Ltd., on capital goods acquired by them on lease in terms of Rule 57(R)(3) of Central Excise Rules, 1944 can be availed prior to reimbursing the leasing company for the Excise Duty component or the same can be availed only after reimbursing the leasing company for the excise duty portion.

2. Whether the Tribunal is correct in holding that as Rules 57A to 57V of C.Ex.Rules, 1944 were substituted from 31-3-2000 vide Notification 27/2000-CE (NT) without any saving clause, no action of seeking to disallow Modvat credit can be initiated."

3 Appeal No.173 of 2008 was admitted by order dated 10th September, 2008 by framing following substantial questions of law which read thus :-

"(a) Whether the MODVAT Credit availed by M/s Ispat Industries Ltd. on capital goods acquired by them on lease in terms of Rule 57(R) (3) of Central Excise Rules, 1944 can be availed prior to reimbursing the leasing company the Excise Duty component, or the same can be availed only after reimbursing the leasing company for the excise duty portion?

(b) Whether in the facts and circumstances of the case and in law the Hon'ble CESTAT is justified in dismissing the appeal of the Revenue in view of the Respondents not being eligible for credit as claimed?"

4 The first substantial question of law in both the Appeals is the same.

5 The proceedings originated on the basis of the show cause notice issued by the Revenue to the respondent – assessee on 4th February, 2002. The Order-in-Original dated 31st January, 2006 was passed by the Commissioner of Central Excise. The Commissioner of Central Excise held that the respondent had availed premature credit of Rs.3,14,20,082/- and therefore, the respondent is liable to pay back the said amount. He imposed penalty of Rs.25 Lakhs under Section 11AC of the Central Excise Act, 1944 (for short "the said Act"). The respondent was also directed to pay interest in accordance with the provisions of Section 11AA of the said Act. An Appeal was preferred by the Appellant – Revenue against the said Order-in-Original dated 31st January, 2006. The reason for preferring the Appeal by the Revenue was that the demand of approximately Rs.10 Crores which was incorporated in the show cause notice was not confirmed. The Appeal was preferred before the Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench at Mumbai. By judgment and order dated 10th September, 2007 the said Appeal was dismissed. Appeal No.173 of 2008 preferred by Revenue takes exception to the said order.

6 Against the same Order-in-Original dated 31st January, 2006, the respondent preferred an Appeal before the Appellate Tribunal. By judgment and order dated 24th July, 2006 the Appellate Tribunal proceeded to set aside the Order-in-Original and allow the Appeal preferred by the respondent. Central Excise Appeal No.109 of 2007 has been preferred by the Revenue against the said order.

7 Before we refer to the submissions canvassed by the learned counsel appearing for the parties, it will be necessary to note few factual aspects of the case and the allegations in brief made in the show cause notice.

8 The allegation is that the respondent – assessee had availed lease assistance from State Bank of India (for short "SBI") and Industrial Finance Corporation India Limited (for short "IFCI"). Reliance was placed on lease agreement dated 7th August, 1996 executed by and between IFCI and the assessee for Rs.1,27,00,000/-. Lease agreement dated 6th March, 1997 was executed by and between the respondent – assessee and State Bank of India for Rs.50 Crores. In the show cause notice, a reference was made to the important clauses in both the agreements. As far as the agreement between the respondent and IFCI is concerned, reliance was placed on clause 10.15 of the lease

agreement which provided that cost of equipments will also include excise duty. It was provided that in case the respondent avails MODVAT benefit against the same, the respondent shall deposit the said MODVAT amount with IFCI. As far as the lease agreement between the respondent and the State Bank of India is concerned, it was provided therein that in case lessee proposes to avail MODVAT on the specific excise duty paid in terms of the erstwhile Central Excise Rules, 1944 (for short “Unamended Rules”) of which due intimation will be given by the lessee (respondent) to lessor (SBI). In such case, the cost of acquisition will not include excise duty payable on the equipment.

9 In the show cause notice, reliance was placed on the letters of 30th March, 2000 and 28th March, 2000 issued by IFCI and SBI respectively. As far as IFCI is concerned, it was stated in the said letter that the respondent has not commenced payment lease rentals/or installments. It was stated that only interest is being paid by the respondent.

10 As far as the letter addressed by the SBI is concerned, it was confirmed that the payment of lease rentals had not commenced and assets subject matter of lease are not capitalized in the books of accounts.

11 On 16th July, 2001 IFCI converted the leasing facility granted to the respondent into Non-Convertible Debentures. In the letter dated 17th October, 2001 addressed by the IFCI it was informed that in view of conversion into Non-Convertible Debentures, lease agreement of 7th August, 1996 stands terminated.

12 Reliance is placed on statements of officers of respondent as well as statement of the officers of IFCI and SBI. Reliance was placed on Unamended Rules. It was alleged that no credit can be given to the assessee as payment of Central Excise Duty to be availed as MODVAT credit by the assessee is a pre-condition of erstwhile Rule 57R(3). The allegation in the show cause notice is that MODVAT credit on capital goods has been availed by assessee by willful mis-statement, suppression of facts and by contravention of the unamended Rules with the intention of evading payment of duty. Therefore, a demand in the sum of Rs.13,69,66,121/- was made being utilized inadmissible MODVAT credit. A demand was made for penalty under Sections 9 and 11AC of the said Act and Rules 57U(6), 173U, 210,226 of the erstwhile Rules. Moreover, it was mentioned that capital goods have been rendered liable for confiscation.

13 As stated earlier, by Order-in-Original dated 31st January, 2006 only a part of the demand was confirmed to the extent of Rs.3,14,20,082/- along with imposition of penalty of Rs.25 Lakhs. In the Order-in-Original, the Adjudicating Authority held that the respondent – assessee had contravened Rule 57R(3) of the unamended Rules on the ground that the respondent has taken MODVAT credit without paying leasing company an amount equivalent to the excise duty component on the capital goods. Therefore, it was held that as the respondent had availed credit of the duty payable on capital goods prior to reimbursing the excise duty to the financing company, the credit availed was premature. It was held that the fact that the lease agreement executed by IFCI was converted into Non-Convertible Debentures was not at all relevant. It was observed that even the fact that excise duty was reimbursed to SBI prior to payment of first installment of lease rental, was not at all relevant on the ground that the same ought to have reimbursed prior to availing credit. However, the Commissioner accepted the contention raised by the respondent that there is no basis provided in the notice for alleging that credit of Rs.13,69,64,121/- had been availed. As observed earlier, the Commissioner held that the respondent – assessee had rendered himself liable for penalty under Section 11AC. However, on the directors of the respondent, penalty under Rule 209A of the unamended Rules was not

imposed.

14 In ordinary course, the Appeals preferred by the Revenue and the assesse against the same order dated 31st January, 2006 ought to have been decided together. The Appeal was preferred by the Respondent on 1st March, 2006. As copy of Memorandum of Appeal of the Appeal preferred by the appellant is not on record, the precise date on which the said Appeal was filed is not on record. The Appeal was preferred by the appellant – Revenue in April, 2006. Nevertheless, the Appeal preferred by the appellant – Revenue was decided on 10th September, 2007 by which the order of Commissioner of not confirming the demand to the extent of approximately Rs.10 Crores was confirmed. As far as the Appeal preferred by the Respondent – Revenue is concerned, the Appellate Tribunal held that as far as transaction with SBI is concerned, there is no contravention of Rule 57R(3) of unamended Rules. In paragraph 2.1 of the judgment and order dated 24th July, 2006 it was held that Rule 57R(3)(ii)(b) does not contain any stipulation to the effect that credit of capital goods acquired on the lease can be availed only after reimbursement of the excise duty component to the financing company. The Appellate Tribunal noted that as far as IFCI is concerned, the agreement was converted into Non-Convertible Debentures from July, 2001 and that till that date, the Respondent had not paid any lease rental. That is the reason why it was

observed that there was no contravention of Rule 57R(3). In paragraph 2.2, it was observed that even taking the case of the department as correct, the Respondent would have been eligible to credit at least from 1st April, 2000. It was also held that for premature availment of credit, at best, assessee can be made liable for payment of interest, if any applicable in accordance with law. As far as SBI is concerned, it was observed that admittedly, excise duty was reimbursed to SBI prior to payment of lease rental and hence, there was no contravention of Rule 57(R)(3). Another finding recorded was that the change of view/change of interpretation by the department cannot be a cause to invoke the larger period of limitation for issuing notice of dis-allowance and therefore, the notice was held to be barred by limitation. That is how the Appellate Tribunal proceeded to allow the Appeal preferred by the respondent.

15 The learned counsel appearing for the Appellant – Revenue has taken us through the findings recorded by the Appellate Tribunal. The submission of the learned counsel appearing for the Appellant is based on substantial questions of law formulated in the Memorandum of Appeal in both the Appeals. He invited our attention to Rule 57R of the Central Excise Rules, 1944 (for short "the said Rules") and submitted that MODVAT credit cannot be availed prior to reimbursing the leasing component to the financing company. He urged that merely

because there is no saving clause in the notification by which Rules 57A to 57B were substituted on 31st March 2000, it cannot be said that the action for disallowance of MODVAT cannot be taken. He submitted that the Tribunal has completely ignored the doctrine of merger. He also placed reliance on the relevant clauses in the lease agreements executed by and between the respondent and IFCI as well as by and between the respondent and SBI. The submission is that the fact that the lease agreement with IFCI was cancelled and converted into Non-Convertible Debentures with effect from July, 2001 is completely irrelevant. The submission is that reliance placed by the Appellate Tribunal on the decision in the case of *Sunrise Structurals and Engineering Ltd. Vs. CCE*[1] is completely misplaced. He submitted that the credit could not have been availed by the Respondent on the admitted facts. The learned counsel appearing for the Respondent supported the impugned judgment and order.

16 We have given careful consideration to the submissions. We have perused the show cause notice and other documents on record. The show cause notice proceeds on the footing that the Respondent availed of MODVAT credit in the sum of Rs.13,69,64,121/-. It appears that the show cause notice is in respect of credit availed during the period from April, 1997 to March, 1998.

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1 2004 (117) ECR 307 (Tri-Mum).

17 Firstly, it is necessary to advert to the findings recorded by the Commissioner in the Order-in-Original. We have carefully perused the Order-in-Original and in particular the findings recorded from paragraph 15 onwards. After perusing the notice, in paragraph 20, the Commissioner has recorded a finding of fact that though in the notice it is alleged that the credit of Rs.13,69,64,121/- has been availed, the Annexures 'C' and 'D' quantifies the credit to the tune of Rs.3,14,20,082/- by giving reference to RG-23C Part-II entry numbers as well as the date of availment of such credit. There is a specific finding recorded that in absence of any evidence to the contrary, a finding will have to be recorded that the amount of credit availed by the assessee was Rs.3,14,20,082/-. The Commissioner held that there was no adequate evidence on record to impose mandatory penalty of equal amount. He, therefore, imposed penalty of Rs.25 lakhs under Section 11AC of the Central Excise Act, 1944 (for short "the said Act"). He ordered payment of interest under the provisions of the Central Excise Act. As regards the proposed action against the Directors/officers of the Respondent under Rule 209A of the said Rules, he held that the notice does not clearly establish as to how the three individuals have dealt with the goods so as to render them liable to confiscation.

18 At this stage, it will be necessary to make a reference to the

relevant Rules before its amendment with effect from 1st April, 2000. Firstly, we refer to the unamended Rule 57R and in particular Sub-Rule 3 thereof, which reads thus:-

> (3) The credit of the specified duty paid on the capital goods shall be allowed to a manufacturer if the capital goods are acquired by the manufacturer on lease, hire-purchase or loan agreement, from a financing company subject to the following procedure, namely :-
>
> (i) The manufacturer shall file a declaration before the Assistant Commissioner of Central Excise as required under rule 57 T”
>
> (ii) The manufacturer availing credit of the specified duty paid on capital goods, who has entered into a financial arrangement, –
>
> (a) for financing the cost of such capital goods excluding the specified duty, shall produce a copy of the invoice referred to in rule 57T, evidencing payment of specified duty along with a copy of the agreement entered into by him with the said financing company; or
>
> (b) for financing the cost of such capital goods including the specified duty, shall produce a certificate from the financing company to the effect that the duty specified on such capital goods has been paid by the said manufacturer to such financing company prior to payment of first lease rental instalment or first hire-purchase instalment or first instalment of re-payment of loan, as the case may be, along with a copy of the agreement entered into with the said financing company.
>
> (iii) The manufacturer and the financing company shall not claim depreciation under the Income-tax laws on that part of the value of capital goods which represents the amount of specified duty paid on such capital goods.
>
> (iv) The relevant documents required for the purpose of availing credit of the specified duty paid on such capital goods under rule 57T shall bear the name of the manufacturer along with that of the financing company.”

Sub-Rule (3) basically provides that the credit of the specified duty paid on the capital goods shall be allowed to a manufacturer if the capital goods are acquired by the manufacturer on lease, hire-purchase or loan agreement, from a financing company subject to following the procedure provided in clauses (i) to (iv) in Sub-Rule 3. The basic entitlement to avail credit is laid down in Sub-Rule 3. Clauses (i) to (iv) lay down the procedure for availing of a credit. Sub-clause (b) of clause (ii) incorporates a requirement of producing a certificate from the financing company to the effect that the duty specified on such capital goods has been paid by the said manufacturer to such financing company prior to payment of first lease rental installment, or first hire-purchase installment or first installment of re-payment of loan, as the case may be, along with a copy of the agreement entered into with the said financing company. The allegation in the show cause notice is of breach of Sub-Rule (3) which is quoted above.

19 We have also perused amended Rules and in particular Rule 57 AC and Sub-Rule 3. Sub-Rule (3) reads thus:

> "3. The CENVAT credit in respect of duty paid on the capital goods shall be allowed to a manufacturer even if the capital goods are acquired by the manufacturer on lease, hire purchase or loan agreement, from a financing company."

The difference in Sub-Rule (3) of erstwhile Rule 57R and Sub-Rule (3) of Rule 57AC is crystal clear from the plain reading of both the Sub-Rules. The procedure which is provided under Sub-Rule (3) of Rule 57R is not provided in the amended provision.

20 Now we turn to the impugned order dated 24th July 2006, which is the subject matter of challenge of Appeal No.109 of 2007. The said order accepts the finding of fact that the agreement with IFCI was converted into Non-Convertible Debentures from July 2001 and that the Respondent has not paid any lease rentals till the date of conversion. Thus, from the date of conversion, the procedure which is required to be followed as per sub-clause (b) of clause (ii) of Rule 57R(3) will not apply. As far as SBI is concerned, the admitted position which is recorded in paragraph 2.1 of the impugned order is that the excise duty was reimbursed under Rule 57R(3) and in particular Sub-Rule (3) thereof. The finding recorded on the basis of admitted position is that there was no contravention. In paragraph 2.1, the Appellate Tribunal, after considering 57R(3) has rightly observed that the said provision does not contain any stipulation to the effect that credit on capital goods acquired on lease can be availed only after reimbursement of the excise duty component to the financing company. The clauses (i) to (iv) of Sub-Rule (2) of Rule 57R provide for procedure and not a condition precedent. The finding of fact recorded is that till the date of conversion

into Non-Convertible Debentures, no installment was paid towards repayment to IFCI. A letter of IFCI placed on record shows that only interest was paid.

21 Paragraph 2.2 of the impugned order takes a note of the fact that in the substituted rules, no such requirement as specified in Sub-Rule (3) of Rule 57R of unamended Rules has been incorporated. There is an observation made in paragraph 2.2 which reads thus :

> "We agree and find that for such premature availment of credit, assessee could at best be liable for interest, if any applicable as per law, if the credit was utilized by debit entries before the eligibility de hors the certificate as per Rule 57R (3) (iii)."

22 As far as the penalty is concerned, reliance was placed on the decision of *Kapadia Enterprise Vs. Union of India*[1] in paragraph 17, the Division Bench of this Court held thus :-

> "To our mind, the stand of the Department suffers from legal fallacy. Proviso to Section 11A in clear terms provides that normal period of limitation of one year for initiation of proceedings for recovery of excise duty would be extendable in cases where such duty has not been levied or paid or short-levied or short-paid or erroneously refunded by reason of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of the Act or the rules with intent to evade payment of duty by such person or his agent. The words 'such person or his agent' are extremely significant. The recovery is to be made from a person from whom such duty is not levied or has not paid or short-levied or short-paid or erroneously refunded.

1 2013 (287) ELT 255 (Guj.)

> Extended period of limitation therefore, would be applicable if it is found that such occurrence of non-levy of duty etc. is on account of any fraud, collusion, wilful mis-statement or suppression of facts or contravention of statutory provisions with intent to evade duty by such a person or his agent. Specific language of the section does not permit any other meaning."

23 As regards the impugned order subject matter of Appeal No.173 of 2008 is concerned, the same is dated 10th September 2017. By that time, the order dated 24th July 2006 was passed by the Appellate Tribunal on the Appeal preferred by Respondent - assessee and on that ground, the Appeal has been dismissed. It is for this reason that we have gone into the merits of the findings recorded in the Order-in-Original.

24 In the circumstances, we find no error in the judgment and order dated 24th July 2006. As regards the liability for interest the Appellate Tribunal had made observation which we have noted above. As there is no challenge by the Respondent to the said finding, the liberty granted in terms of the said observation will continue to operate.

25 Subject to what is observed above, the Appeals are dismissed. There shall be no order as to costs.

(RIYAZ I. CHAGLA J.) **(A.S. OKA, J)**