IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 13.04.2017

CORAM

THE HONOURABLE MR.JUSTICE RAJIV SHAKDHER

And

THE HONOURABLE MR.JUSTICE R.SURESH KUMAR

C.M.A.No.219 of 2011

And

M.P.No.1 of 2011

Commissioner of Central Excise and Service Tax,
1, Williams Road, Cantonment,
Thiruchirapalli 620 001. ... Appellant

Vs.

1.M/s. Bharat Heavy Electricals Ltd. (HPBP),
Thiruchirapalli.

2.Customs, Excise & Service Tax Appellate Tribunal,
South Zonal Bench,
Shastri Bhawan Annexe - I,
1st Floor, No.26 Haddows Road,
Chennai - 600 006. ... Respondents

Prayer:

Appeal filed under Section 35 G (2) of the Central Excise Act, 1944, against the order passed in Final Order No.792/2009 dated 01.07.2009, by the Customs, Excise and Service Tax Appellate Tribunal, Chennai Bench, Chennai.

For Appellant : Ms.R.Hemalatha
For Respondents : Mr.J.Shankarraman

J U D G M E N T

(Judgment of the Court was delivered by RAJIV SHAKDHER,J.)

1.This appeal has been filed under Section 35 G (2) of the

Central Excise Act, 1944, whereby, challenge is laid to the final order dated 01.07.2009, passed by the Customs, Excise and Service Tax Appellate Tribunal, Chennai Bench, Chennai.

2.The issue involved, in the present appeal, according to the learned counsel for the Revenue, Ms.Hemalatha, is covered by the Division Bench judgment of this Court in Commissioner of Central Excise, Puducherry Vs. CESTAT, Chennai, 2015 (323) E.L.T. 323 (Mad.).

3.The broad facts arising in the case are set out in the very first paragraph of the Tribunal. For the sake of brevity, the same are extracted hereunder:

> "The brief facts of the case are that during the period in dispute the appellants had cleared boilers without payment of duty to BARC, Vishakapatnam and Bombay. Initially they had also availed CENVAT credit on some input services which were used in or in relation to the manufacture of the above product. No separate accounts had been maintained for input services. Revenue has invoked Rule 6(3)(b) of the CENVAT Credit Rules 2004 to demand 10% if the net sale price of the exempted goods and also levied interest but not imposed any penalty. Hence this appeal by the assessee."

3.1.We are told by Ms.Hemalatha, that there is no dispute as to the facts culled out above.

4.In so far as the aforementioned judgement is concerned, the principles enunciated therein are set out in paragraph nos.11 to 13. For the sake of convenience, the relevant portions of the same, are extracted hereunder:

> "11.Rule 57CC, on which reliance is placed by the learned counsel for the appellant, was introduced with effect from 01.09.1996. As per the said provision, where a manufacturer is engaged in the manufacture of any final product, which is chargeable to duty as well as in any other final product, which is exempt from the whole of the duty of excise leviable thereon, or is chargeable to nil rate of duty and the manufacturer takes credit of the inputs used in the manufacture of both exempted and dutiable final products, the manufacturer shall pay 8% of the price of exempted products unless separate books of

accounts are maintained as per sub-rule (9) of Rule 57CC.

12.It is clear from a plain reading of Rule 57CC that where a manufacturer is engaged in the manufacture of any final product, which is chargeable to duty as well as in any other final product, which is exempt from the whole of the duty of excise leviable thereon, or is chargeable to nil rate of duty, if the manufacturer takes credit of the inputs used in manufacture of both exempted and dutiable final products, in the absence of the manufacturer maintaining separate books of accounts as required under sub-rule (9) of Rule 57CC, the manufacturer is liable to pay 8% of the price of exempted products.

13.For claiming the benefit under Section 57CC(9) of the Act, the manufacturer has to maintain separate books of accounts, sub-section (2) to Section 73 of the Finance Act, 2010 mandates that the assessee has to make an application to the Commissioner of Central Excise along with documentary evidence and a Certificate from the Chartered Accountant or a Cost Accountant, certifying the amount of input credit attributable to the inputs used in or in relation to the manufacture of exempted goods within a period of six months from the date on which the Finance Bill, 2010 received the assent of the President. However, in the present case, even as per the show cause notice and the order of adjudication, it is clear that the input credit has been reversed by the respondent/ assessee even prior to the amendment. In such view of the matter, the Tribunal, following the decision of the Allahabad High Court in Hello Mineral Water case (Supra), which followed the decision of the Apex Court in Chandrapur Magnet Wires case (supra) rightly set aside the demand."

5.In brief, the Division Bench, has observed that if reversal of Cenvat credit has been carried out, prior to issuance of show cause notice, then, it amounts to payment of duty.

6.The Tribunal has accordingly, in this particular case, remanded the matter to the Adjudicating Authority, to not only verify the said fact but to also ascertain the exact amount of Cenvat credit qua which reversal has, purportedly, been carried out by the Assessee/ first respondent.

6.1.A further direction has also been issued by the Tribunal, which requires verification of the claim made by respondent no. 1/ Assessee, to the effect, that, it is not liable to pay interest, as at the relevant point in time, it had sufficient balance available in the RG 23A account.

6.2.Given the aforesaid position, according to us, no interference is called for with the impugned judgment and order of the Tribunal.

7.The appeal is accordingly, dismissed. However, there shall be no order as to costs. Consequently, the connected pending application is also closed.

Sd/
Assistant Registrar

/True copy/
Sub Assistant Registrar

To

1.The Customs, Excise & Service Tax Appellate Tribunal,
South Zonal Bench, Shastri Bhawan Annexe - I,
I Floor, No.26, Haddows Road, Chennai - 600 006.

2. The Commissioner of Central Excise and Service Tax,
1, Williams Road, Cantonment,
Tiruchirappalli 620 001.

+1cc to M/s.R.Hemalatha, Advocate SR.No.22535

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SDR 11.05.2017