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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 15.11.2017

CORAM :

THE HONOURABLE MR.JUSTICE RAJIV SHAKDHER

AND

THE HONOURABLE MR.JUSTICE R.SURESH KUMAR

C.M.A.No.2545 of 2011

M/s.Shasun Chemicals and Drugs Ltd.,
Represented by its General Manager-Commercial,
Mr.C.Bhaskar Rao,
Shasun House,
No.3, Doraiswamy Road, T.Nagar,
Chennai – 600 017.

... Appellant

Vs.

1.The Customs, Excise and Gold (Control) Appellate Tribunal,
Shastri Bhavan
No.26, Haddows Road,
Chennai – 600 006.

2. Commissioner of Customs & Central Excise (Appeals)
No.1, Williams Road,
Cantonment, Trichy -1.

3. Assistant Commissioner of Central Excise,
Beach Road,
Pondicherry-1.

... Respondents

Prayer : The appeal filed under Section 35G of Central Excise Act, 1944, to set aside the final order Nos. 535 & 536 of 2001 dated 15.03.2001 passed by the first respondent herein with consequential relief.

For Appellant : Ms. Ragini for
M/s.S.Murugappan
For Respondents : Mr.A.P.Srinivas

JUDGEMENT

(Judgment of the Court was delivered by **R.SURESH KUMAR,J.**)

This Civil miscellaneous appeal has been filed against the final order Nos. 535 and 536 of 2001 dated 15.3.2001 passed by the first respondent, i.e., the Customs, Excise and Gold (Control) Appellate Tribunal, Chennai, (hereinafter referred to as CEGAT, Chennai).

2. The necessary facts which are required to be noticed for disposal of this miscellaneous appeal are as follows:

(i) The appellant / assessee was engaged in manufacture of proprietary medicines falling under Chapter 30 of the first schedule to the Central Excise Tariff Act, 1985. The assessee company was registered with Central Excise Department for the purpose of accounting the manufacture of various products and for paying appropriate excise duty as applicable in terms of Central Excise Act, 1944 (in short, 'the Act'). One of the products manufactured by the

assessee company is "Analgin". For the manufacture of the said product, among other inputs, three raw materials namely, Methyl Aceto Acetate, Cysteamine and Isoprophyl Alcohol are required, which, the assessee company regularly imported from abroad.

(ii) During the relevant period, under the Central Excise Rules, 1944 (hereinafter referred to as, 'Rules'), there was a scheme called MODVAT scheme. According to the scheme, a manufacturer of excisable goods is permitted to avail credit of excise duty paid on various inputs, or countervailing duty or additional duty paid on the imported raw materials, and utilize the same for the purpose of paying duty on the finished goods.

(iii) The assessee company filed declarations and had details as required under Rules, accordingly, they were availing credit of excise duty paid on the locally procured materials, and credit of additional duty paid on imported materials.

(iv) In such exercise, for the import of Methyl Aceto Acetate, the assessee company paid excise duty as well as additional duty under Bill of Entry No.40821 dated 22.11.1993. The quantity imported was 15,336 Kgs of Methyl Aceto Acetate and additional duty paid was Rs. 1,75,928.17. After payment of duty and once the goods cleared from the customs and when it reached the petitioner's factory located at Cuddalore, they have taken credit of the said amount of the additional

duty i.e., 1,75,928.17 in the MODVAT register, namely, RG23A Part I and Part II.

(v) Like that, the other two raw materials, Cysteamine and Isoprophyl Alcohol were also imported and appropriate customs duty including additional duty were paid under cover of Bill of Entry No. 41752 dated 11.11.1993 and 41662 dated 17.11.1993 respectively. The quantity of Cysteamine imported was 6000 Kgs for which the additional duty paid was Rs.1,78,526.57. The quantity of Isoprophyl Alcohol imported was 25,600 Kgs and the additional duty paid for this material was Rs.1,27,096.94. In respect of these consignments also, after the goods were cleared from the customs and reached the factory located at Cuddalore, the assessee company availed the MODVAT credit and entered the details in the MODVAT register, namely, RG23, Part I and Part II.

(vi) It is one of the condition that, in order to avail the credit facility under MODVAT scheme, the duty paid on the materials received at the factory should be accompanied by documents specified in Rule 57 G(4) of the Rules. For the imported materials, the relevant documents to be compared will be the original copy of the triplicate Bill of Entry filed with customs and showing the duty payment particulars. When the assessee company availed MODVAT credit paid on the above three raw materials, the said credit was availed on the basis of the

original copy of the triplicate Bill of Entry as provided for in the Rules.

(vii) Thereafter, the original copies of the triplicate Bill of Entry, had been sent for budgetary preparation for the year 1993-94 to the Head Office at Chennai. While the same was sent back to the Cuddalore factory, during transit, it was lost. Thereafter, when the assessee company filed returns with the Excise Authorities, since the original of the triplicate bills were lost, those documents were not able to be produced.

(viii) Therefore, the Superintendent of Central Excise issued a show cause notice to the petitioner company on 29.6.1994 asking to show cause as to why the duty availed by the assessee company should not be expensed under Rule 57(I) and penalty should not be imposed against them under Rule 173Q for violation of Rule 57 G r/w Rule 173G of the Rules.

(ix) In response to the said show cause, the assessee company had sent a reply on 29.7.1994, wherein the assessee had stated that, since the original of the triplicate copy of the Bill of Entry, was lost during transit, from Head Office to factory, the assessee company had approached the Assistant Commissioner of Customs, Madras, who after scrutiny of documents, had issued attested triplicate copy of Bills of Entry No. 41662 dated 08.11.1993, in respect of import of Cysteamine HCL and for remaining Bill of Entry, the Assistant Commissioner of

Customs had assured to issue after verification of original Bill of Entry with the customs. Therefore, the assessee company requested further time extension to produce the certified copy to be issued by the Customs Department in respect of other Bills of Entry. Afterwards on 17.8.1994, the assessee had submitted photocopies of Bill of Entry in question, duly certified by the Customs, for favour of necessary action, as the original Bill of Entry were lost during transit.

(x) The said certified copies of Bill of Entry obtained from the Customs Department had been since produced or sent along with the said letter dated 17.8.1994 to the Revenue, who gave the show cause notice to the assessee. However, the third respondent by letter dated 23.9.1994, after having rejected the plea of the assessee on the strength of production of certified photocopy of the original Bill of Entry, had confirmed the demand of Rs.3,05,623.41 being the wrongly availed MODVAT credit, under 57A of the Rules, raised in the show cause notice, and also imposed a penalty of Rs.200/-.

(xi) Subsequently, the Revenue had also issued further show cause notice dated 14.7.1994 almost on similar line of earlier show cause notice in respect of the other two items, namely, Methyl Aceto Acetate and also Isoprophyl Alcohol.

(xii) In response to the said show cause notice, the assessee company on 17.8.1994 had given a reply by annexing the photostat

copies of Bill of Entry in question duly certified by Customs Department.

(xiii) However, the Revenue without accepting the said request made by the assessee company to accept the photostat copies duly certified by the Customs Department, confirmed the demand of Rs.1,75,928.17 as a wrongly availed MODVAT credit under Rule 57A of the Central Excise Rules, 1944 as raised in the show cause notice and also imposed a penalty of Rs.200/-.

(xiv) Aggrieved over the said orders of assessment / Demand passed by the Revenue, the Assessee company preferred an appeal before the Commissioner of Customs and Central Excise (Appeals), the second respondent herein. The Commissioner (Appeals) after having considered the appeal filed by the Assessee company in A.Nos.131/95 and 132/95 (T) had, in his order dated 26.6.1996, allowed the appeals by setting aside the orders of assessment passed by the Revenue.

(xv) As against the order of Commissioner (Appeals) dated 26.6.1996, the Revenue preferred further appeal to the first respondent / Tribunal, namely CEGAT, Chennai.

(xvi) The first respondent/ Tribunal by its final order dated 15.3.2001 in an appeal E / 1344 & 1345/96/MAS has allowed the appeals by setting aside the order of Commissioner (Appeals) dated 26.6.1996. Aggrieved by the said order of CEGAT, dated 15.3.2001,

the assessee, in fact filed writ petition in W.P.No.21602 of 2001 which was admitted on 09.11.2001 and was pending before this Court. However, by order dated 21.7.2011, a learned Judge, who heard the said writ petition, had passed an order in W.P.M.P.No.418 of 2011, whereby, the learned Judge permitted the assessee to convert the said W.P.No.21602 of 2001 into Civil Miscellaneous Appeal (CMA) under Section 35 G of the Act. Accordingly, the said writ petition has been converted / re-numbered as C.M.A.No.2545 of 2011 with substantial questions of law to be decided by this Court. Accordingly, the present CMA was admitted on 21.10.2011 by a Division Bench of this Court whereby the following three questions of law had been framed:

"1. Whether a certified copy of bill of entry filed under the Customs Act, 1962 can be accepted as a specified document under Rule 57G of Central Excise Rules, 1944 for the purpose of availment of MODVAT credit?

2. Whether the first respondent was justified in law while denying the availment of MODVAT credit by the appellants on mere technical grounds when actually there is no dispute regarding the duty payment and the usage of the inputs in the manufacture of final products ? And

3. Whether the first respondent was by law justified in setting aside the order of the

second respondent when there is substantive and substantial compliance of Rule 57G(2) of the Central Excise Rules?”

3. We have heard Ms.Ragini, learned counsel appearing for the assessee / appellant and also Mr.A.P.Srinivas, learned standing counsel appearing for the Revenue / respondents.

4. The learned counsel appearing for the assessee would submit that, the issue as to whether MODVAT credit can be allowed for an imported raw material without submitting the documents enumerated under Section 57 G (3) of the Rule, has already been decided in a number of cases, in favour of the assessee, especially, in the context, where, if the importer / manufacturer actually brought the inputs to the factory and having utilized the same for manufacturing of finished goods and also had availed the MODVAT credit, based on anyone of the documents mentioned under 57 G (3) of the Rules. In support of her contention, the learned counsel for the assessee would rely upon the Judgment of the Division Bench of the Allahabad High Court reported in **2015 324 ELT 264 (All). COMMR. OF CUS.& C.EX. VS. MATSUSHITA TELEVISION & AUDIO INDIA LTD.**

5. The learned counsel for the assessee would also state that,

the assessee had imported the raw materials as inputs and had paid duty by production of original documents, based on which, those materials as inputs reached the factory. Only at the time of filing the returns, the assessee was not able to produce the triplicate copy of the Bills of Entry, as it was lost during transit of the same from the Head Quarter of the assessee company at Chennai to the assessee's factory located in Cuddalore.

6. She would also submit that, however, in response to the show cause notice of the Revenue, the assessee, since lost the triplicate copy of the Bill of Entry, had approached the Customs authorities and obtained duly certified photo copy of the Bill of Entry and produced the same before the officers concerned of the Revenue. Therefore, the learned counsel would state that, it is not a case where duty had been paid without documents and it is also not a case of the Revenue that inputs had not reached the factory with documents and accordingly, not subjected to excise duty.

7. Therefore, the learned counsel for the assessee would submit that, only at the time of filing the returns, since the triplicate copy of the Bill of Entry was not available as it had been lost during transit, it could not be filed. However, in order to show its *bonafide* and as a

token of proof that the duty for the subject imported goods had already been paid, and the same had been used as an input at the factory of the assessee / manufacturer, it produced the certified photocopy of Bill of Entry duly certified by the customs authorities. Therefore, the learned counsel would state that the non-filing of original triplicate copy of Bill of Entry, either at the time of filing of returns or pursuant to the show cause notice issued by the Revenue, should not be a reason to deny such MODVAT credit taken by the assessee.

8. Per contra, Mr.A.P.Srinivas, learned standing counsel appearing for the Revenue, has relied upon the following Judgments to substantiate his contentions that the photo copy of original documents cannot supplant the necessity of producing original documents as contemplated under Rule 57 G (3) in order to avail of MODVAT credit.

(i) 2013 (293) E.L.T 208 (All.), COMMISSIONER OF C. EX., ALLAHABAD VS. HINDALCO INDUSTRIES LTD.

(ii) 2014 (310) ELT 859 (Mad.), CPRM STEELS LTD. VS. CESTAT, CHENNAI.

(iii) 2015 (322) ELT 124 (A.P.), S.S. ORGANICS LIMITED VS. COMMISSIONER OF CENTRAL EXCISE, HYDERABAD

9. By citing and relying upon the aforesaid decisions, Mr.A.P.Srinivas, learned standing counsel would argue that, in view of the consistent decisions taken by the Courts of law, the assessee is not entitled to take MODVAT credit without the availability or production of original triplicate copy of the Bill of Entry. The learned standing counsel would also submit that, even though certified photostat copy of the Bill of Entry had been sent or produced, pursuant to the show cause notice issued by the Revenue, that would not cure the defect of producing the original Bill of Entry as the relevant rule, namely, 57 G(3) of the Rules, specifically contemplate that any one of the documents enumerated under sub clause (iii) of the said Rule, should have been produced before the Revenue for availing the MODVAT credit and therefore, without any one of such document as contemplated under the Rule, it cannot be claimed by the assessee that, they would be entitled to claim the MODVAT credit, by merely filing photostat or attested / certified copy of the documents.

10. The learned standing counsel in this regard would heavily rely upon the aforesaid three Judgments, including the Division Bench Judgment of this Court, which is a jurisdictional High Court and submit that, therefore, the said Judgment would bind the Tribunal, which passed the Order impugned herein. Hence, the learned standing

counsel would state that, since the plea raised by the assessee, has already been decided by this Court, as well as other High Courts, in the aforesaid Judgments, the issue is no more *res integra* and therefore, the impugned order, is fully justifiable and sustainable.

11. We have heard the learned counsel appearing for both sides and have perused the materials placed before this Court.

12. On the factual side, it is not in dispute that the assessee is a manufacturer of pharmaceutical drugs. For the said purpose, constantly, the assessee company had been engaging in importing raw materials. It is also not in dispute that three such raw materials had been imported by the assessee for which duty had been paid against the Bill of Entry dated 22.11.1993, 11.11.1993 and 17.11.1993. It is also not in dispute that pursuant to the said Bill of Entry, after having paid the duty, the goods were cleared from the customs and sent to the factory of the assessee located at Cuddalore, where the assessee claimed MODVAT credit against each of the import and those claims had been registered and details entered in the MODVAT register, namely, RG23 Part I and Part II and RG23A Part I and Part II.

13. It is the further case of the assessee that, subsequently, the

original triplicate copy of the Bill of entry had been sent to Chennai Head Office for preparation of the budget for the year 1993-94 and after the exercise, when it was dispatched along with other documents, during transit it was lost, and therefore, the assessee's factory at Cuddalore was not able to produce the said original triplicate copy of Bills of Entry at the time of filing the returns.

14. Though the aforesaid claim on the side of the assessee had not been specifically disputed by the Revenue, it had issued show cause notice to the assessee asking to show cause as to why, the taking MODVAT credit on the basis of alleged Bill of Entry, without having produced the original triplicate copy at the time of filing the return, should not be cancelled and should not be expensed.

15. In this regard, the case of the assessee was that, they did produce the original triplicate copy of the Bill of Entry, at the time of paying the duty and only thereafter, it was lost during transit as the assessee company is having its factory at Cuddalore and head office at Chennai. In this regard, the further case of the assessee is that, it is not in dispute that the raw materials were imported and against the Bill of Entry, duty had been paid and only thereafter, the inputs reached the factory. And it is also not in dispute that those inputs alone were

utilized for manufacturing the finished products, which were subjected to payment of excise duty, as against which only, as per the MODVAT rule, the assessee claimed MODVAT credit on the basis of the entry registered in the MODVAT register.

16. Therefore, the only issue to be decided, according to the assessee, in this case is that, whether the production of attested / certified photocopy of the triplicate Bill of Entry can be treated as a valid document for the purpose of allowing the MODVAT credit to the assessee and whether that question can be decided, according to the assessee's counsel, on the basis of the Judgment of a Division Bench of Allahabad High Court reported in **2015 (324) E.L.T 264 (All.)** cited supra.

17. Before we dwell into the case laws, the relevant rule may be looked into and therefore, we extract the relevant rule, namely, 57G(3) which reads thus:

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Rule 57G(3):- No credit under sub-rule(2), shall be taken by the manufacturer unless the inputs are received in the factory under the cover of any of the following documents, namely:-

(a) an invoice issued by a manufacturer of inputs under Rule 52A or 100E of the said rules;

(b) an invoice issued by the manufacturer of inputs from his 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 provided the depot or the premises, as the case may be, is registered under Rule 174;

(c) triplicate copy of a bill of entry

(d) a certificate issued by an Appraiser of Customs posted in foreign post office;

(e) an invoice issued by a first stage dealer of excisable goods, registered under Rule 174;

(f) an invoice issued by a second stage dealer of excisable goods registered under Rule 174 and duly authenticated by the proper officer;

(g) an invoice issued by a dealer on or before the 31st day of August, 1996;

(h) an invoice issued by an importer registered under Rule 174 and duly authenticated by the proper officer;

(i) an invoice issued by an importer from his depot or from the premises of the consignment agent of the said importer

provided the said depot or the premises, as the case may be, is registered under Rule 174, and duly authenticated by the proper officer;

(j) an invoice issued by a first stage or second stage dealer of imported goods registered under Rule 174 and duly authenticated by the proper officer;

(k) duplicate copy of a bill of entry generated on Electronic Data Interchange System installed in any Customs or Central Excise Commissionerate;

(l) a certificate issued by the Superintendent of Central Excise or by the proper officer in the Customs area under Rule 57E; and

(m) an invoice issued by a manufacturer of final products under sub-rule(3) of Rule 57F or sub-rule(1) of Rule 57S

Explanation – For the purposes of this section -

(1) “first stage dealer” means a dealer who purchases the goods directly from -

(a) the manufacturer under the cover of an invoice issued under Rule 52A or Rule 100 E or from the depot of the said manufacturer, or from 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, under cover of an

invoice issued under Rule 57G; or

(b) an importer or from the depot of an importer or from the premises of the consignment agent of the importer, under cover of an invoice issued under Rule 57G.

(ii) "second stage dealer" means a dealer who purchases the goods from a first stage dealer."

18. Among various documents as enumerated above, under Rule 57G(3), the triplicate copy of Bill of Entry is one of the documents in clause (c) of Rule 57G(3).

19. In the case in hand, it is the claim of the assessee that, the said triplicate copy of the Bill of Entry was produced, and only based on which duty was paid for clearing the goods from customs, and those goods imported are nothing but three named items of raw materials which are necessary inputs for manufacturing the final product at the factory.

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20. In this regard, the claim of the assessee is that, those imported items, since have been subjected to duty, had been cleared by the customs only on the basis of Bill of Entry, and those items had reached the factory, whereupon the assessee had claimed MODVAT

credit, by making entry in the Register and only based on that, the claim was made by the assessee to avail the MODVAT credit. Therefore, the said plea on the side of the assessee cannot be easily brushed aside, as it is not the case of no duty was paid based on documents or no imported goods reached the factory as inputs with documents and also not the case that the said inputs had not been utilized for manufacturing the finished goods.

21. With these factual matrix of the present case in hand, let us look into the Judgment of Allahabad High Court, where the following question of law had been framed by the said Court.

"Whether on the facts and circumstances, the MODVAT credit can be taken on the basis of the photostat copy of BOE ?"

22. The aforesaid question of law framed in the said case is exactly similar to that of the 1st question of law framed in this case also.

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23. The factual matrix of the said case has been narrated at paragraph 4 of the said Judgment, where also, there was no dispute that at the time when the goods in question were received in the factory of production, the same were covered by all requisite

documents including the triplicate copy of Bill of Entry, but subsequently, triplicate copy of Bill of Entry was misplaced and as such, the assessee therein, obtained the exchange control copy of the relevant Bill of Entry from the bank and produced the same before the Central Excise Authority concerned.

24. Here, in the case in hand, almost a similar situation was prevailing where, the goods imported were received in the factory of production and the same were covered by the requisite documents including the triplicate Bill of Entry which was lost subsequently and in lieu thereof, the assessee had produced duly attested / certified photocopy of the triplicate Bill of Entry.

25. The only difference between the said case and the case in hand is, there, the alternative document produced was "exchange control copy" obtained from bank, here, the alternative document was "certified photostat copy of the triplicate Bill of Entry".

26. On the basis of the given facts in the said case, the Division Bench of the Allahabad High Court has given the reasons and conclusion which are recorded at paragraph 8, and they are reproduced hereunder:

"8. We find that there is no allegation in

the show cause notice that the goods in question were not received under the cover of the relevant documents and that the goods were duty paid. The Assistant Commissioner Central Excise Division-III, NOIDA has also not disputed the duty paid character of the goods and the fact that these were received in the factory for intended purpose under the cover of relevant documents. The case of the department is that the triplicate copy of bill of entry as required under Clause (c) of sub-rule(3) of Rule 57G could not be subsequently produced by the assessee for defacement. The stand taken by the assessee that the triplicate copy of the relevant bill of entry was misplaced, was also not disbelieved either by the Assistant Commissioner or by the first appellate authority. Since the triplicate copy of the bill of entry was misplaced and, as such, the assessee obtained from the bank the exchange control copy of the relevant bill of entry and filed the same along with various other documents. He also executed an indemnity in favour of the Central Excise department to the extent of Modvat credit availed. The said authenticated exchange control copy of the bill of entry obtained by the assessee from the bank could have been easily verified by the authorities. It is not the case of

the appellant that the said document was not verifiable”

27. Here also, if the same analogy is adopted, the certified photostat copy of the triplicate Bill of Entry, since was issued by the Customs Authorities, can very well be verified by the Excise Authority, therefore, it cannot be said that the MODVAT Credit claimed by the assessee is without any document within the meaning of Rule 57G(3).

28. The learned counsel appearing for the assessee would also rely upon the following Judgments of the Madhya Pradesh High Court:

(i) **2002 (140) E.L.T. 370 (M.P.), Union of India Vs. Klockner Supreme Pentaplast Ltd.**

(ii) **2009 (241) E.L.T. 31 (M.P.), Union of India Vs. Kataria Wires Ltd.**

29. In the first case, i.e., **2002 (140) E.L.T. 370 (MP)**, (cited supra), the issue was that, the assessee therein claimed MODVAT credit by producing certified copy of the Bill of Entry. Since the MODVAT credit was disallowed by the original authority, the assessee preferred an appeal before the CEGAT against the disallowance of MODVAT credit on the ground that the reconstructed triplicate copy of

the Bill of Entry, cannot be considered as a valid document for availment of MODVAT credit.

30. Considering the said case, the CEGAT found the issue infavour of the assessee as against which Revenue carried the matter to the High Court of Madhya Pradesh, where the Division Bench of the said High Court has held as follows:

"6. We have gone through both the orders, perused the record. In our considered opinion, no question of law arises in this matter for consideration of this Court. The CEGAT has recorded a finding that respondent No.1 had actually submitted the Bill of Entry in triplicate in original at the time of taking the Modvat credit but subsequently it was lost, on account of shifting of office, but to satisfy the Department, they had once again obtained certified copy from the Department and produced the same. Thus, the Tribunal has rightly held that for such a matter, no substantial question of law arises and rejected the application of the applicant. We find no ground for interference in the said matter. The M.C.C is accordingly dismissed. Parties to bear their own costs."

31. In the second case cited above, (i.e., **Union of India Vs.Kataria Wires Ltd.**), the assessee therein, by producing the certified copy of the invoice, issued by the jurisdictional superintendent, to fulfill the requirement of Rule 57G of the Central Excise Rules, 1944 claimed MODVAT credit. However, it was rejected on the ground that the production of certified copy of the invoice cannot be treated as fulfillment of requirement of Rule 57G of the Rules.

32. As against the said order of the Assessing Authority the matter was appealed and the Commissioner (Appeals) while setting aside the order of the Assessing Authority held that, the assessee was eligible for MODVAT credit on the invoice certified by the jurisdictional Superintendent of Central Excise. Aggrieved by the same, the Revenue prepared the appeal before the CESTAT, where also the view of the Commissioner (Appeals) was confirmed, against such decision, the matter was carried by the Revenue before Madhya Pradesh High Court.

33. In that case, the High Court of Madhya Pradesh has held as follows:

"4. We have perused the impugned order, heard the learned counsel and carefully

considered the requirement of Rule 57G of the Rules. Though Rule 52A in Sub.R.3 lays down requirement of production of original and in the absence thereof, a duplicate, one cannot be oblivious of the fact that in some cases if original and the duplicate, both are lost, the claim cannot be defeated especially when department did not dispute receipt of the goods, their use in the manufacture of final product and duty paid character of inputs. Since the duty was paid for the inputs and inputs were used in captive consumption for manufacture of final product, merely because original and duplicate copy as required by Rule 52A, C, (i),(ii) were lost, the claim could not have been defeated especially when certified copy duly issued by the jurisdictional Superintendent was produced. Under these circumstances, we do not perceive any error in the order passed by the CESTAT. Accordingly, we do not find that the case involves any substantial question of law, much less the question formulated by the appellant. The appeal is dismissed summarily."

34. Now, let us move on to assess, as to whether the principles and findings given by various High Courts in the aforesaid three Judgments (cited supra) cited by the side of the assessee, can be

made applicable to the facts of the present case.

35. In the present case, the original Assessing Authority by his order dated 23.9.1994, has recorded that, 'the assessee were given time upto 20.8.94 to give reply and produce all the evidences, in connection with this issue vide this Office letter under C.No.IV/16/257/94,UCD dated 8.8.94. And, the assessees responded by submitting the photostat copy of the original certified copy of Bill of Entry in question, duly certified by the Customs, as the original one was lost during transit vide their letter dated 17.8.94 and, in as much as they have produced the copy of the document in question, they contended that the availment of Modvat Credit on the impugned goods covered by the said document is right and, therefore, requested for dropping of further proceedings on the issue.'

36. In the order dated, 26.6.1996 passed by the Commissioner (Appeals), on assessing the factual matrix, he has recorded as follows:

" 2. I observe that appellants' claim that they were in possession of the triplicate copy of the Bill of Entry at the time of taking credit has not been denied in the impugned order. They were only not in a position to submit the same as required under rule 57G(4) of Central Excise

Rules, 1944 which cannot be the reason for disallowing the credit, more so, when certified copies of triplicate copy of the Bill of Entry evidencing payment of duty have been submitted. In this view of the matter, the impugned orders cannot be sustained and are therefore, set aside."

37. However, the CEGAT (Tribunal) in its impugned order, having not accepted the findings given by the Commissioner (Appeals) observed that, the facts which were not in dispute are that, at the time of submission of RT 12 returns, the respondents did not submit the original of the triplicate copy of Bill of Entry.

38. The Tribunal, further observed that, the learned counsel for the respondents have been emphatic that there was no allegation by the department that the original triplicate copy of the Bill of Entry was not received along with the goods. It has further held that, they did not find any substance in the argument of the assessee's counsel. The reason for such finding, according to the Tribunal, was that, the department came to know about the documents for the first time these are submitted along with RT 12 returns.

39. Only based on these findings, the Tribunal ultimately, came to the conclusion that, the assessee is not eligible to claim MODVAT credit on the basis of the documents submitted by them i.e., certified photostat triplicate copy of Bill of Entry. However, the aforementioned Judgments point in the direction that, if there is no specific denial or a definite case of the Revenue that the original / triplicate copy of the Bill of Entry had not accompanied the input materials received at the factory and, once, the certified photostat copy of the documents enumerated under Section 57G(3) were made available, then, certainly, based on those documents, MODVAT credit could be availed by the assessee.

40. Therefore, we are of the view that, the facts as well as the finding given by the Division Bench of the Allahabad High Court in the aforementioned Judgment **2015(324) E.L.T.264 (All)** (cited supra) would squarely apply to the case on hand.

41. The aforesaid two Judgments of the Madhya Pradesh High Court also would support the legal position articulated by the Allahabad High Court, in **MATSUSHITA TELEVISION & AUDIO INDIA LTD** case.

42. At the same time, the learned counsel appearing for the

Revenue, has relied upon three Judgments of different High Courts, which have been referred to above. Therefore, let us take up those Judgments also and examine.

43. The first Judgment is **2013 (293) E.L.T. 208 (All.)**(cited supra) of the Allahabad High Court. In the said Judgment, the fact remains that, in that case MODVAT credit was denied by the Assistant Commissioner of Central Excise, Mirzapur on the ground that, the words, 'duplicate invoice' was not mentioned in the invoices and in one invoice, the portion showing the words, "original and duplicate," was torn and according to Rule 57G of the Rules, as it stood during the relevant period MODVAT credit could have been allowed only on furnishing of duplicate invoice and not otherwise.

44. The following Judgments given by the Allahabad High Court in the aforesaid decision can usefully be referred to hereunder:

"38. Applying the principles laid down by the Apex Court in the aforesaid cases to the facts of the present case, we are of the considered opinion that the amendment made in Rules 57G of the Rules by insertion of sub-rule (11) vide Notification No.7/99, dated 9th February, 1999 relates to procedure for availing Modvat credit and does not affect any

substantive right. The view which we are taking is similar with the view taken by the Punjab & Haryana High Court as also Madhya Pradesh High Court and Chhattisgarh High Court as also the Circular issued by the Central Board of Excise and Customs dated 23rd February, 1999.

39. From the conjoint reading of the Rules 52A, 57G and the amendment made by Notification No.7/99, dated 9th February, 1999 by which sub-rule(11) was inserted in Rule 57G, we are of the considered opinion that filing of the documents for availing Modvat credit is only a procedural matter and the amendment made vide Notification No.7/99, dated 9th February, 1999 which inserted sub-rule (11) in Rule 57G the position was made clear that Modvat credit should not be denied only on the ground that the documents referred to in sub-rule (2) does not strictly comply with the said Rule but contains the details of payment dues, description of goods, assessable value, name and address of the factory or warehouse etc. This position has also been clarified by the Central Board of Excise and Customs by issuing a Circular in exercise of its power under Section 37B of the Act and made it applicable to all pending cases."

45. Thus the view of the Allahabad High Court in the aforesaid Judgment is that, even after the amendment made to Rule 57G by insertion of Rule 11 by notification No.7/99 dated 09.2.1999, the filing of documents is only procedure for availing MODVAT credit and therefore, the substantive right of the assessee would in no way get affected. It is the further finding of the said High Court, in the aforesaid Judgment is that, the filing of documents for availing MODVAT credit is only a procedural matter and by virtue of notification No. 7/ 99, dated 09.2.1999 which inserted sub-rule 11 in Rule 57G, made it clear that, MODVAT credit should not be denied only on the ground that the documents referred to in sub-rule (2) does not strictly comply with the said rule but contains the details of payment of dues, description of goods, assessable value etc.

46. Therefore, the principles which can easily be culled out from the aforesaid Judgment is that, the aspects mentioned in Rule 57G, especially in the context of filing documents to claim MODVAT credit is procedural and if at all there is any lacuna on the part of the assessee in complying with these procedural requirements of filing documents that would not affect the substantive right of the assessee to claim MODVAT credit.

47. In this regard, the relevant portion of the clarificatory notification issued by the Revenue in Circular No. 441/7/99 CX dated 23.2.1999, is extracted hereunder:

"2. The Assistant Commissioner, before issuing Show Cause Notice for wrong availment of Modvat credit by the assessee on any procedural grounds, shall conduct enquiries with regard to duty paid nature of the goods as the suppliers send, ensure that necessary information as mentioned in the Notification are available on the invoice and satisfies himself whether the goods have been used or are intended to be used as contemplated in the Modvat Rules. In case the assessee's invoice contains the details viz. description of the goods, assessable value, name and address of the factory or warehouse where the goods are to be received, and if the assessee has filed a declaration as contemplated in the Modvat rules, the Assistant Commissioner having jurisdiction over the factory would allow the credit of duty so paid after making enquiries as above.

3. It should hereafter be ensured that Show Cause Notices are not issued for procedural lapses as mentioned in the Notification without making proper enquiries. Wherever the Assistant Commissioner, after

making due enquiry, is satisfied that the Modvat credit taken by the assessee is incorrect, adjudication proceedings in the normal course should be initiated. Efforts, however, should be directed toward reduction of litigation.

4. All pending cases may be disposed of accordingly.

5. Trade and field formations may be suitably informed."

48. The second Judgment cited by the Revenue is **2014 (310) E.L.T. 859 (Mad.)**(cited supra). In that case, the fact remains that, when the importer sent the goods removed from Visakhapatnam Steel Plant, had produced only one invoice for the entire consignment, whereas the said consignment had been split into several smaller consignments. Only in that context, in view of Rule 52A(4) of the Rules, the Division Bench has held that, when a consignment is split up into two or more lots and, each of which is dispatched separately either on the same day or on different days, separate invoice shall be made in respect of each lot. Only in that context, single invoice produced by the assessee was not accepted by the Revenue and therefore, that stand was accepted by the Division Bench of this Court in the said Judgment.

Therefore, the facts mentioned in the said case also, in our considered view, would not be applicable to the facts of the present case and therefore, the said Judgment also in our view, is clearly distinguishable.

49. Insofar as the third case, as cited by the Revenue, i.e., **2015 322 E.L.T. 124 (A.P.)** (cited supra) is concerned, it was a case, where, the question arose was, as to whether the appellant company can avail the MODVAT credit on the basis of original invoice. There the position was that, the appellant company lost the duplicate copy of the invoice in transit and the said fact was not denied and disputed. Therefore, on the basis of the said factors of the case, in the context of Circular instructions given by the Government of India, Ministry of Finance (Department of Revenue), Central Board of Direct Taxes, New Delhi in Circular No.68/68/94-CX, dated 24.10.1994, the Division Bench, has decided the issue in favour of the Revenue. However, the fact situation and the context under which, such a decision was made by the Division Bench, can be easily noticed, as it has been recorded in paragraph 5 of the Judgment. The case of the assessee in that case to claim MODVAT credit on the basis of original bill as he lost its duplicate invoice, was negated, only in view of the circulars issued by the Revenue. Inorder to have a better appreciation, paragraph 5 of the

said Judgment are reproduced hereunder:

"5. Furthermore, the circular instructions issued by the Government of India, Ministry of Finance (Department of Revenue), Central Board of Direct Taxes, New Delhi in Circular No.68/68/94-CX, dated 24.10.1994, read as follows (para 4):

"4. The credit can be availed only on the duplicate invoices issued under Rule 52A or Rule 57GG and the original invoices can be used for taking credit only where the duplicate invoice is lost in transit and that too after proper scrutiny and the satisfaction of the Assistant Collector. As such taking a credit against original instead of duplicate documents should be exceptional rather than general practice. It seems that this aspect is not properly verified due to routine inspection / verification by the Range Officer / Audit Parties and other senior officers".

As seen from the above circular instructions, it would clearly indicate that the Modvat credit can only be availed on duplicate invoices and the Department is bound to follow the circular instructions in view of the judgment reported in Union of India v. Arviva Industries (I) Ltd.- 2007(209) E.L.T.5(S.C.) = 2008(10) S.T.R. 534 (S.C)., wherein it was held thus (para 6):

6. In this particular case, the Board's Circular No.39/99-Cus., dated 25th June, 1999

extends the benefit of Brand Rate of Drawback to compensate exporters for the re-rolled steel products and processed fabrics. The High Court has rightly come to the conclusion that the circulars issued by the Board are binding on the department. An effort was made by the learned Solicitor General to get this case referred to a Larger Bench. We do not accept this contention in view of number of decisions and especially the Constitution Bench decision in Dhiren Chemical Industries (I) (supra)."

From the above circular instructions, it is clear that the circular instructions are binding on the department and in pursuance of circular instructions only, the order impugned before appellate authority was passed and that order needs no interference by this Court.

6. Accordingly, the Central Excise Appeal is dismissed. There shall be no order as to costs. Miscellaneous petitions, if any, pending in this appeal shall stand closed."

50. The factual situation in this case is certainly a different one than the factual matrix of the said case and therefore, the said case of the Division Bench of the High Court of Hyderabad for the State of Telengana and the State of Andhra Pradesh also, in our view, is clearly distinguishable.

51. On analysis of the Judgments cited both by the assessee as well as the Revenue, we are of the view that, the latest Judgment of the Allahabad High Court made in **2015 (324) E.L.T. 264 (All.)** (cited supra) alone is closest to the facts of the present case.

52. Also the question of law framed in the said case is exactly the similar one as has been framed here in the present case in hand. Therefore, the said Judgment of Allahabad High Court being the latest one, and also to the point on similar facts, we are of the view that, the view taken by the Allahabad High Court in the said Judgment of **2015 (324) E.L.T. 264 (All.)** can very well be pressed into service in the present case.

53. Since we are in respectful agreement with the view taken by the High Court of Allahabad, in the said Judgment cited supra, i.e., **2015 (324) E.L.T. 264 (All.)**, we would state that the stand taken by the Assessing Authority, though got reversed before the Commissioner (Appeals) but confirmed by the first respondent, Tribunal, in our considered view, is erroneous, and is liable to be interfered with.

54. Accordingly, the impugned order of the first respondent / Tribunal is set aside and the questions of law framed in this appeal are

answered in favour of the assessee and against the Revenue.

55. In the result, this Civil Miscellaneous Appeal is allowed, without any order as to costs.

(R.S.A.,J.)

(R.S.K.,J)

15.11.2017

Index: Yes/No

Internet: Yes/No

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To

1.The Customs, Excise and Gold (Control) Appellate Tribunal,
Shastri Bhavan
No.26, Haddows Road,
Chennai – 600 006.

2. Commissioner of Customs & Central Excise (Appeals)
No.1, Williams Road,
Cantonment, Trichy -1.

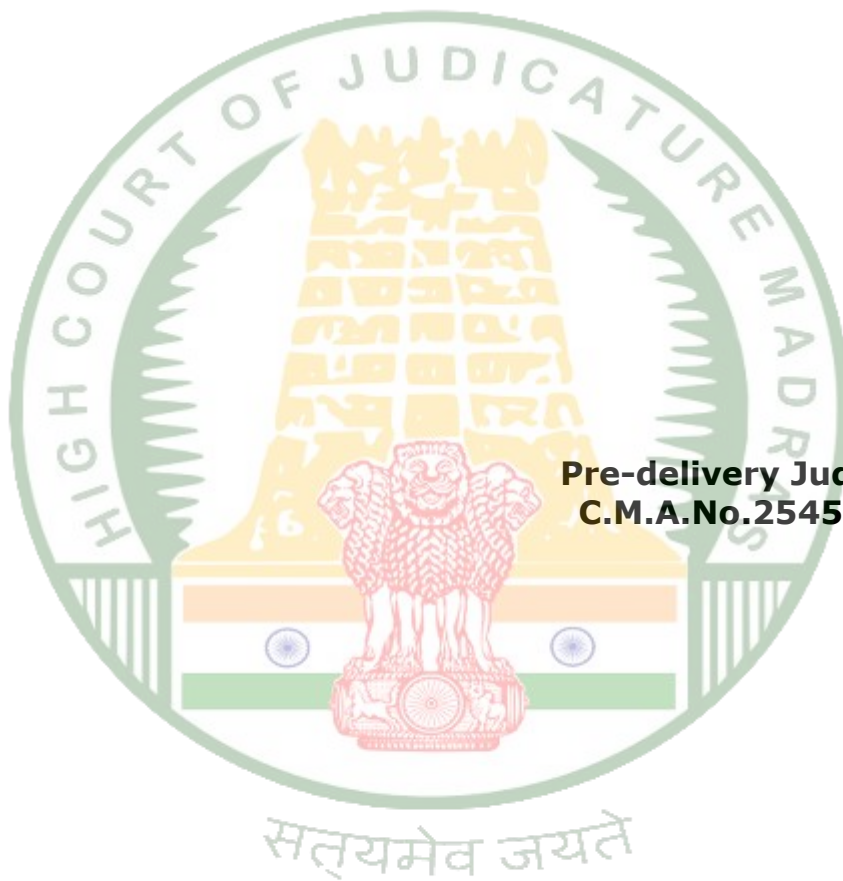
3. Assistant Commissioner of Central Excise,
Beach Road,
Pondicherry-1.

RAJIV SHAKDHER, J.

AND

R.SURESH KUMAR, J.

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**Pre-delivery Judgment in
C.M.A.No.2545 of 2011**

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