

THE HON'BLE SRI JUSTICE C.V. NAGARJUNA REDDY  
AND  
THE HON'BLE SRI JUSTICE CHALLA KODANDA RAM

C.E.A. No.135 of 2017

DATED:30-10-2017

Between:

The Commissioner of Central Excise and  
Service Tax,  
Tirupati Commissionerate,  
9/86-A, Behind West Church Compound  
Amaravathi Nagar  
M.R.Palli,  
Tirupati – 517 502 ... Appellant

And

Shree Radha Krishna Alloys Pvt. Ltd.  
Plot No.52, APIIC, Growth Centre  
Thumakunta, Hindupur  
Anantapur District, A.P. ... Respondent

COUNSEL FOR THE APPELLANT: Sri Suresh Kumar  
Routhu,  
Standing Counsel for  
the Customs, Central  
Excise and Service Tax

COUNSEL FOR THE RESPONDENT: -

THE COURT MADE THE FOLLOWING:

**JUDGMENT:** *(per the Hon'ble Sri Justice C.V. Nagarjuna Reddy)*

This central excise appeal arises out of final order dt.31.10.2016 in Appeal No.E/23733/2014, on the file of the Customs, Excise and Service Tax Appellate Tribunal, Regional Bench, Hyderabad (for short, "the Tribunal").

2. The respondent has availed Cenvat credit in respect of MS Plates, HR sheets etc., used for fabrication of capital goods, namely, reheating, furnace, conveyor No.1, transfer table and parts of crane gantry, cooling bed etc., installed in the factory. The Additional Commissioner of the Central Excise, Customs and Service Tax, Tirupati, issued a show cause notice dt.7.5.2013 calling upon the respondent to show cause as to why a sum of Rs.22,53,110/- (Rupees Twenty Two Lakhs Fifty Three Thousand and One Hundred and Ten only) shall not be recovered for wrongly/irregularly availing/utilizing the Cenvat credit along with interest and penalty. The respondent has submitted its explanation. By order dt.25.03.2014, the Additional Commissioner has disallowed the Cenvat credit of the aforementioned amount and also imposed interest, and penalty of a sum equivalent to the disallowed Cenvat credit. Feeling aggrieved by the said order, the respondent filed an appeal before the Commissioner of Customs, Central Excise &

Service Tax (Appeals), Guntur. By order dt.23.09.2014 the Commissioner (Appeals) has allowed the appeal. The appeal filed by the appellant before the Tribunal having been dismissed, the present appeal is filed by the Department.

3. A perusal of the order of the Commissioner (Appeals) shows that the order of the Additional Commissioner was reversed on two grounds, namely, that the subject items in fabrication of identifiable capital goods are used while setting up of factory and not for any construction activity. While arriving at the said conclusion, the Commissioner (Appeals) relied upon the report of the Range Officer. He has rendered a categorical finding that the respondent has used the subject items in the fabrication of capital goods and therefore those goods are eligible for credit. Another reason for setting aside the order of the Additional Commissioner assigned by the Commissioner (Appeals) was that the former has exercised his jurisdiction during the extended period of limitation under Section 11A of the Central Excise Act, 1944 (for short, “the Act”) and that mere suppression of facts without fraud or collusion or wilful misstatement should not make a case fall under the said provision. The Tribunal, on reconsideration of the case endorsed the view taken by the Commissioner

(Appeals). In support of its conclusion, the Tribunal has relied upon the judgment in *Ultra Tech Cement Ltd. v. CCE, Raipur*<sup>1</sup>, which in turn has referred to the judgment of the Supreme Court in *Continental Foundation Jt. Venture v. Commissioner of Central Excise, Chandigarh*-1<sup>2</sup>.

4. While exercising jurisdiction under Section 35G of the Act, this Court would not re-appreciate the facts in issue. Both the lower fora have concurrently found that the items were used in fabrication of capital goods which are eligible for Cenvat Credit. Therefore, finding on this aspect does not give rise to any substantial question of law.

5. As for the availment of extended period of limitation under Section 11A of the Act, the Supreme Court in *M/s. Continental Foundation Jt. Venture* (2 supra) held that the word “suppression” used in Section 11-A of the Act has to be construed strictly and mere omission to give correct information does not constitute suppression of facts unless it was deliberate with a view to avoid payment of duty. A perusal of the show cause notice shows that there is no allegation of either wilful suppression or fraud or collusion against the respondent. The Commissioner (Appeals) in his order

---

<sup>1</sup> 2016 (332) ELT 356 (Tril. Del.)

<sup>2</sup> 2007 (216) ELT 177 (SC)

dt.23.09.2014 stated that the appellants therein are filing monthly ER1 returns by which keeping the department well informed about the transaction of the business with duty particulars along with copies of invoices of Cenvat details as well as its availment and that the Department cannot feign ignorance and allege suppression of facts to raise demand of duty by extending period of limitation. On a careful consideration of the reasons assigned by the Commissioner (Appeals), which were upheld by the Tribunal, we are of the opinion that they are sound, convincing and cogent and therefore the Additional Commissioner has erroneously issued the show cause notice during the extended period of limitation which is not available on the facts of the case.

For the aforementioned reasons, we do not find any merit in this appeal and the same is accordingly dismissed.

---

C.V. NAGARJUNA REDDY, J

---

CHALLA KODANDA RAM, J

30-10-2017

*bnr*