

HIGH COURT OF CHHATTISGARH, BILASPUR**Judgment reserved on 13-03-2018****Judgment delivered on 17-05-2018****TAXC No. 130 of 2016**

1. Commissioner, Central Excise, Customs & Service Tax Bilaspur, At Central Excise Bhawan, Tikrapara, Dhamtari Road, Raipur, Chhattisgarh

---- Petitioner**Versus**

1. M/s Jindal Steel & Power Ltd. Post Box No.16, Kharsia Road, P.O. & District Raigarh, Chhattisgarh

---- Respondent**TAXC No. 137 of 2016**

1. M/s Jindal Steel & Power Ltd. A Company Incorporated Under The Companies Act, 1956 Having Its Office At Kharsia Road, Distt. Raigarh, Chhattisgarh, Through Vice President, Finance And Account R.P.Agrawal, Aged 52 Years, S/o Late Shri S.N.Agrawal.

---- Petitioner**Versus**

1. Commissioner, Customs, Central Excise & Service Tax, Bilaspur Central Excise Building, Dhamtari Road, Tikrapara, Raipur, 492001, Chhattisgarh

---- Respondent

For Revenue
For Assessee

Shri Vinay Pandey, Advocate
Shri Yogendra Aldak, Shri Malay Shrivastava
& Shri Raja Sharma, Advocates

Hon'ble Shri Justice Prashant Kumar Mishra**Hon'ble Shri Justice Ram Prasanna Sharma****C A V Judgment**

The following judgment of the Court was delivered by ***Prashant Kumar Mishra, J.***

1. The appeal preferred by the Revenue bearing TAXC No.130 of 2016 has been admitted for hearing on the following substantial question of law :

“Whether the action of the assessee in taking re-credit of CENVAT amount after the Revenue had already rejected his claim can be termed as a fraudulent or other illegal activity done with an intention of defrauding the Government Officials ?”

2. The other appeal preferred by the assessee, arising out of the same impugned order, bearing TAXC No.137 of 2016, has not been admitted for hearing.
3. Both the matters i.e TAXC Nos.130 & 137 of 2016 were placed for analogous hearing in view of the order passed in TAXC No.137 of 2016 on 19-4-2017, therefore, this appeal (TAXC No.137 of 2016) is heard on admission.
4. The assessee is aggrieved by reversal of Cenvat Credit entry to the tune of Rs.49,62,640/- and is seeking entitlement to take re-credit of the said amount.
5. Facts of the matter, briefly stated, are that during the relevant period the assessee had availed input service tax credit attributable to generation of electricity, which is used captively in the manufacture of final product and a portion is wheeled out/sold by the assessee as merchant power. The Revenue objected to the taking of Cenvat Credit by the appellant in terms of Rule 6 (3A) of the Cenvat Credit Rules, 2004 (for short ‘the Rules, 2004’). Following which the assessee reversed the Cenvat Credit amounting to Rs.49,62,640/-. For denial of such credit, the Department issued the show cause notice on 27-6-2013, however, pending adjudication of the dispute the assessee took re-credit of the said amount reversed earlier. This was done on the basis of its own internal auditor’s report. The Department

again objected to taking of *suo motu* re-credit and the show cause notice issued against the assessee was adjudicated.

6. By order dated 29-6-2015 the Commissioner, Central Excise, Bilaspur, *inter alia*, holding that the input and input service in the generation of electricity, which is used in the factory for manufacture of final goods are eligible for credit but input and input service attributable to electricity wheeled outside and not used within the factory is not eligible for credit and the credit entry is required to be reversed as per the provisions of Rule 6 or Rule 6 (3A)(c)(iii) of the Rules, 2004. It is also held that the noticee cannot take re-credit which is already under demand in another show cause notice pending adjudication. The Commissioner further held that the assessee is also liable for interest under Rule 14 of the Rules, 2004 and penalty under Rule 15 (2) of the Rules, 2004 read with Section 11AC(1)(b) of the Central Excise Act, 1944 (for short 'the Act, 1944').
7. Imposition of penalty was on the ground that initially the assessee wrongly availed the Cenvat Credit involved on the goods without being eligible to do so and reversed the credit entry when this was objected to by the Department and when show cause notice was issued, during pendency of proceedings of first show cause notice, the assessee again availed the credit of re-reversing the entry.
8. By the impugned order, the Tribunal has set aside the order imposing penalty, however, it maintained the order of the Commissioner to the extent of disallowance of Cenvat Credit and further observed that the liability can be fastened on the assessee, if there is insufficient balance in the Cenvat account between the dates of taking re-credit and the reversal thereof. Thus, the matter of interest liability will arise

in such situation, which is to be worked by the original authority on verification of facts.

9. While the Department is aggrieved by setting aside the order of penalty, the assessee is aggrieved by disallowance of Cenvat Credit to the tune of Rs.49,62,640/- and fastening of liability towards interest.
10. It appears the assessee was issued the present/subject show cause notice on 31-1-2014, *inter alia*, mentioning that vide Revenue's letter dated 7-11-2013 the assessee was directed to submit the information about actual use and final products manufactured out of the goods described in the Annexure to the said letter. In the said letter of the Superintendent, Central Excise, Range : Raigarh, apart from other goods on which input Cenvat credit were availed during the period January, 2013 to August, 2013 Cenvat credit on Concrete Sleeper amounting to Rs.51,19,424/- was also shown.
11. In reply the assessee informed that Cenvat credit to the tune of Rs.1,56,784/- was availed on Concrete Sleepers, as the same are used by them inside the factory for movement of excisable products meant for removal. However, regarding availment of Cenvat credit of Rs.49,62,640/- the assessee did not inform anything as to on which goods the said credit has been availed. Their description, tariff sub heading and their specific use in the manufacture of final product of the noticee were also not shown. In respect of the said input credit availed by the assessee, it was specifically asked to submit a detailed clarification about the said restoration of Cenvat credit, however, the noticee failed to submit any clarification about availment of Cenvat credit of Rs.49,62,640/-. The noticee was, therefore, required to show

cause as to why irregularly availed Cenvat credit of Rs.51,19,424/- should not be disallowed and recovered along with interest and penalty.

12. Upon adjudication final order was passed on 29-6-2015 disallowing Cenvat credit to the tune of Rs.49,62,640/-; interest under Rule 14 of the Rules, 2004 read with Section 11AA of the Act, 1944; and penalty of Rs.24,81,320/-, which is equal to 50% of the disallowed Cenvat credit under Rule 15 (2) of the Rules, 2004 read with Section 11AC(1) (b) of the Act, 1944.
13. In appeal by the assessee before the Tribunal, the impugned order has been passed setting aside the penalty, but maintaining the disallowance of Cenvat credit of Rs.49,62,640/-.
14. Before us the assessee has failed to demonstrate as to on which particular item or goods the Cenvat credit of Rs.49,62,640/- has been availed. Particularly, it could not be pointed out as to why the Cenvat credit reversed earlier was restored by the assessee when the earlier show cause notice dated 27-6-2013 is still pending adjudication.
15. In absence of the assessee having been able to point out the very basis of avilment of Cenvat credit or restoration of Cenvat credit, which was earlier reversed by it upon receipt of show cause notice dated 27-6-2013, we do not find any ground to admit the appeal preferred as the assessee, however, the first show cause notice is already pending for adjudication, the Tribunal has rightly set aside the penalty imposed on the assessee. Disallowing of penalty in the present proceeding would not come in the way of the Revenue to consider fastening of liability arising out of disallowing Cenvat credit, interest and penalty pursuant to the first show cause notice. Both the

parties shall free to agitate the issues both factual and legal, which may be available to them in the facts and circumstances of the case, during adjudication of the first show cause notice.

16. The appeal preferred by the Revenue is against the said part of the Tribunal's order whereby penalty imposed on the assessee has been set aside.
17. The question of law framed by this Court is to the effect as to whether the action of the assessee in taking re-credit of CENVAT amount after the Revenue had already rejected his claim can be termed as a fraudulent or other illegal activity done with an intention of defrauding the Government Officials ?
18. The assessee has not taken the re-credit of its own, but the same was done on the basis of its Auditor's objection. It amounted to an account entry reversal without there being any revenue impact, as the issue concerning Cenvat credit on the amount of Rs.49,62,640/- is already under adjudication pursuant to the first show cause notice. There appears no *mala fide* or fraudulent act on the part of the assessee, more so, when the first proceedings are pending.
19. We accordingly answer the substantial question of law against the Revenue.
20. As an upshot, both the appeals deserve to be and are hereby dismissed, leaving the parties to bear their own costs.

Sd/-

Sd/-

Judge
Prashant Kumar Mishra
Gowri

Judge
Ram Prasanna Sharma