

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Pronounced on : 01/10/2018

C O R A M

THE HONOURABLE MR.JUSTICE S.MANIKUMAR
A N D
THE HONOURABLE MR.JUSTICE SUBRAMONIUM PRASAD

Civil Miscellaneous Appeal Nos.2973 to 2975 of 2007

Ford India (P) Ltd
S.P.Koil Post
Chengalpattu 603 204.

...Appellant in all the
appeals

Vs

The Assistant Commissioner of Central Excise
Chengelpet Division
Chennai 600 045.

..Respondent in CMA 2973 & 2974/07

The Deputy Commissioner of Central Excise
Chengalpat Division,
Chennai 600 045.

..Respondent in CMA.2975/07

Appeals filed under Section 35 G of the Central Excise Act,
1944 against the common Final Order Nos.263-265 of 2007, dated
21/3/2007 passed by the Customs, Excise and Service Tax
Appellate Tribunal, South Zone Bench, Chennai 600 006.

For appellant ...Mr.Raghavan Ramabadran
(in all appeals) for M/s.Lakshmi Kumaran Sridharan

For respondent ...Mr.A.P.Srinivas
(in all appeals)

C O M M O N J U D G M E N T

(Judgment of the Court was made by SUBRAMONIUM PRASAD,J)

Instant appeals are filed under Section 35 G of the Central
Excise Act, 1944, and directed against the common Final Order
Nos.263-265 of 2007, dated 21/3/2007, passed by the Customs,
Excise and Service Tax Appellate Tribunal, South Zone Bench,
Chennai 600 006.

2. Facts in brief leading to the appeals are as under:-

Appellant/Ford India (P) Ltd., is engaged in the manufacture of Passenger Cars and parts. They have registered, under Section 6 of the Central Excise Act, 1944, vide Registration No.AACH4454H ZM001, dated 29/11/2001. Appellant formed a separate plant called Knock Down Plant "KDP Plant". Auto components duly coated with rust proof oil were procured directly from the vendors, based on specific purchase orders and received at the KDP plant with special packing. They have destination codes indicated on item and countries to which they are to be exported. Packed goods are stuffed into a container are exported from the KDP Plant to South Africa and Mexico, without payment of duty under Bond.

3. The appellant was served with a show cause notice, dated 27/2/2002, stating as under:-

(i).The sole purpose of creation of KDP Plant is only to procure/receive the auto components directly from the vendors for subsequent exports against orders.

(ii).M/s. Ford India Limited have placed orders, on various vendors through specific purchase orders, with distinct identification for the purchase of both VE Madras Assembly and Chennai LOT (Samcot). The description UE Madras Assembly denotes the parts meant for Ford manufacturing plant, as Maraimalainagar and Chennai LOT Samcar denotes the parts, meant for exports to South Africa and Mexico. This distinct purchase orders reveal that the assessee was pre-determined about the quantity meant for export, even before they raised the purchase orders, exclusively for export purpose.

(iii).The rate charged for the components meant for export is higher than the consignment meant for manufacturing plant at MM Nagar.

(iv).All the auto components supplied by the vendors to KDP Plant are packed, with special export packing, which is distinct from the usual packing meant for manufacturing area at MM Nagar.

4. From the above, it appeared to the department that the entire activity carried out at KDP Plant was a trading activity, and cannot be treated as manufacturing activity by any stretch of imagination. According to the department, in as much as there was no manufacturing activity involved, the said auto components received at the KDP Plant and subsequently, exported does not qualify, as "inputs", in terms of the definition envisaged in erstwhile Rule 57 AA of Central Excise Rules, 1944 and Rule 2 (f) of Cenvat Credit Rules, 2001 and hence the CENVAT Credit availed on those auto components does not appear to be correct.

5. The entire activity carried out at the KDP Plant totally appears to be merely a "trading activity" and does not involve any manufacturing activity. Mere sequencing of in-house manufactured components and bought out components as a ready-to-assemble unit cannot be termed as manufacturing activity and is not acceptable in view of the following reasons:-

(i). No new products emerged as a result of the activity carried out at KDP Plant.

(ii). Mere arranging of components in a required sequence does not amount to assembly-subassembly as contended by the assessee in as much as the above said activity does not involve any process leading to fixing of parts together.

(iii). In the KDP Plant, no infrastructure is available to carry out manufacture/assembly except tools and forklift required for packing and movement of said parts upto stuffing.

(iv). The activities involved in the KDP Plant are receiving picking packing and shipping of parts and the above activities cannot be termed as manufacture as per the definition contained in Section 2 (f) of Central Excise Act, 1944.

(v). Neither Section Notes (Section XIV) nor Chapter Notes (Chapter 87) relevant for the said items specify the packing or any other above said operation as amounting to manufacture as in the case of some other Chapter Notes i.e., Chapter Notes of 19.24 etc.

(vi). At no point of time, parts from KDP Plant have been taken to shop area to carry out any manufacturing/assembly operations.

6. Besides the parts received at the KDP Plant are not inter changeable with the parts received at the manufacturing plant for the following reasons:-

(i). The auto component/parts received at KDP Plant are ultimately meant for export are duly coated with rust proof oil which will get absorbed during the transit period of export; whereas the parts intended for the manufacturing plant should not have such coating as the same has to be used immediately on receipt i.e., just in time concept (JIT).

(ii). Though the in-house manufactured components/parts are drawn from the manufacturing area for export, no such transfer of materials/consignments from KDP Plant to manufacturing area has taken place at any point of time which only disproves the claim that the components are inter changeable.

(iii). The cars manufactured at Mexico are left hand driven vehicles whereas the cars manufactured at their Maraimalainagar factory are right side steering model. Hence, the parts received at the KDP Plant ultimately exported are not suitable for manufacture in the factory.

(iv). The components required for the KDP Plant are supplied in required packing conditions whereas the components received in the manufacturing plant are in naked condition and stocked under JIP concept.

7. It appears that the activities carried out at the KDP Plant is merely a trading activity and no sign of any manufacturing activity taking place. Hence the inclusion of KDP Plant in the revised ground plan is liable for deletion from the registered premises in as much as it concerns only with trading activity.

8. In view of the above, authorities deduced that the entire activity done in KDP Plant as merely a trading activity and does not come within the definition of "manufacture", under Section 2 (f) of the Central Excise Act. The authorities therefore were of the view that the components exported as such within the use or related to the manufacture of final product, i.e., Ford model cars and the same are not qualified as inputs, as defined either under erstwhile Central Excise Rules, 1944 or under the present of CENVAT Credit Rules, 2001 and thus, the assessee are not eligible to avail CENVAT Credit on those components, which do not qualify as "inputs".

9. The authorities therefore, came to the conclusion that the assessee has contravened the provisions of erstwhile Rule 57 AB, 57 AC (7) of Central Excise Rules, 1944 and the present Rules 3 & 4 of CENVAT Credit Rules, 2001, inasmuch as they have availed ineligible CENVAT Credit of duty paid on the components which are not at all qualified as inputs, in terms of erstwhile Rule 57 AA and present Rule 2 (f) of CENVAT Credit Rules, 2001. Show cause notice was therefore, issued as to why

(i) the CENVAT Credit irregularly availed by the assessee to the tune of Rs.7,53,44,402/- (Rupees Seven crores fifty three lakh forty four thousand four hundred and two only) as shown in the Annexure - I to the notice covering the period from 1/4/2001 to 30/12/2001 should not be recovered under erstwhile Rule 57 AH (i) upto the period 30/6/2001 and the present equivalent Rule 12 of CENVAT Credit Rules 2002 read with Section 11 A of the Central Excise Act, 1944, for the contravention of the provisions of erstwhile Rules 57 AB (7) of Central Excise Rules 1944 (upto 30/6/2001) and the present Rule 3 & 4 of CENVAT Credit Rules, 2001 (from 1/7/2001).

(ii). Appropriate interest under Section 11 AA of Central Excise Act, 1944 should not be demanded on the quantum of impugned CENVAT Credit shown in (i) above.

(iii). The KDP Plant included in the revised ground plan and endorsed by the department should not be deleted from the same inasmuch as the said premise is exclusively concerned with the trading activity and

(iv). A penalty should not be imposed under erstwhile Rule 1730 of Central Excise Rules, 1944 and Rule 13 of CENVAT Credit Rules, 2001, for the contravention of Rules.

10. The Assistant Commissioner of Central Excise, Chengelpet Division, Tambaram (Original/assessing authority) held that the appellant has taken undue benefits by availing the CENVAT Credit. The original authority, therefore, held that by availing CENVAT Credit, the appellant has got interest free greater financial accommodation which in turn deprived money to the exchequer. The assessing authority held that goods have been procured solely for the purpose of export and are not intended for use in the manufacture of final products. Credit is therefore not available and therefore, the excise authorities were correct in issuing show cause notice even after the period of limitation. Since the appellant had resorted to a novel method of availing CENVAT Credit in a pure trading activity, where no manufacturing process was going on, the Original Authority, deleted the premises of KDP Plant, which was only undertaking the trading activity on export, from the existing manufacturing premises. The authority also directed to recover a sum of Rs. 4,08,89,896/-, being the CENVAT Credit irregularly availed by the assessee during the period 7/6/2000 to 31/3/2001, along with interest payable under Section 11 AA of Central Excise Act. Penalty of Rs.10 lakhs was further imposed on the appellant for the lapse committed.

11. Similarly, for the period 1/4/2001 and 31/12/2001, the assessing authority, vide, order, dated 13/6/2002, passed an order, to recover a sum of Rs.7,53,44,402/-, being the CENVAT Credit irregularly availed by the assessee and a penalty of Rs.20 lakhs on the assessee for the lapses committed. For the period 1/1/2002 to 31/10/2002, the Original Authority, by its order, dated 30/6/2003, directed recovery of a sum of Rs.8,15,38,491/-, being the CENVAT Credit, irregularly availed by the assessee/appellant along with interest and also imposed a penalty of Rs.25 lakhs, on the assessee, for the lapses committed by them.

12. Appeals were filed before the Commissioner of Central Excise (Appeals). The Appellate Authority, by order, dated 18/3/2004, upheld the order of the Adjudicating/Original Authority. Further, appeal was taken to the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, in Final Order Nos.263 - 265 of 2007. Vide, order, dated 21/3/2007, the

Tribunal, held that the KDP Plant was set up only for performing trading activity and there was no manufacturing activity going on. The Appellate Authority also found that activity undertaken at KDP Plant was a process calculated with incidental or ancillary to the production of cars. Tribunal, therefore held as under:-

"7.6 Any input for CENVAT Credit should be brought into factory for being used in, or in relation to, manufacture of final product. If, for any reason, it cannot be so used after having been brought into factory, it may be removed as such for home consumption on payment of duty or may be removed for export under bond without payment of duty. On the other hand, if any goods, usable as input in the manufacture of final produce in factory, is purchased and exported as such by the manufacturer of final product without bringing it into the factory, it is only a commodity of trade and not an "input" at all for purposes of CENVAT scheme and there is no question of availing CENVAT Credit thereon. The appellants' bought-out components exported from KDP plant are in this category as rightly found by the lower authorities. The statements given under Section 14 of the Central Excise Act by the appellants' Manager (Export Operations) and Manager (Taxation) as also by M/s. TVS are supportive of this finding.

8. For the reasons we have already recorded, the appellants were not entitled to avail CENVAT Credit on the components purchased from vendors and directly received into KDP Plant and exported to South Africa and Mexico after quality-checking, sequencing, palleting, etc., during the period of dispute. If they did not utilize such credit for payment of duty on final products cleared for home consumption, they should expunge the credit. If, on the other and, they utilized the credit for payment of duty on such final products, they are liable to pay equivalent amount of duty to the revenue. The decision of the lower authorities to this effect is sustainable.

9. It is on record that the appellants misrepresented before the department that they were setting up an "Export Processing Plant". They set up what was called "Knock-Down-Pack-Plant" (KDP Plant) and applied to the Central Excise Range Officer for including the same as

part of their car factory. The Range Officer, apparently without applying his mind to the matter, acceded to their request. But what the appellants did was to use the so-called 'KDP Plant' for receiving export-bound auto components from vendors, random-checking for quality, sequencing, palleting, packing and directly exporting to South Africa and Mexico. The quality check on the components so purchased from vendors was done at KDP Plant in a random manner, for which only some of the cartons received from vendors were opened. The other operations carried out were sequencing, palleting and packing of these components into containers for export. Departmental investigations revealed that there was no 'knockdown' of anything, nor any such thing as 'export processing', at KDP Plant. It was found that the premises was being used for the above trading activity, which was admitted by Sh.J.Arun, Manager (Export Operations) and confirmed by Sh.R.Saranyan, Manager (Taxation) and also corroborated by Sh.K.J.George, Plant Manager, TVS, i.e., purchasing into components from the market and exporting the same after random quality check, sequencing and palleting. It was on this basis that the original authority de-registered KDP Plant and the appellants are not aggrieved by the same."

13. The Tribunal, however, reduced the penalty of Rs.20 lakhs, for the period 1/4/2001 to 31/12/2001, to Rs.18 lakhs and sustained other portions of the order. This order is under challenge by Ford India (P) Ltd.

14. Learned counsel appearing for the appellant contended inter alia :-

(A). Appellant is eligible to avail CENVAT credit. It is the submission of the appellant that Board Circular, issued in 1996 and 2000 held that inputs cleared as such and exported under bond should be treated on par with export of finished products and hence export under bond should be allowed without reversal of the CENVAT credit availed.

(i). Appellant would further rely on Rule 57 F (4) (iii) of Central Excise Rules, 1944, which according to it provides, for utilisation of CENVAT Credit towards payment of duty of excise on inputs exported, as permitted under Rule 17 F (1). He therefore, submitted that since the credit has to be held to be eligible, there is no question of penalty or interest.

(ii). His alternate submission is that as the CENVAT Credit in dispute has been reversed in full by the appellant, there is no question of payment of interest on the same, because, according to the appellant, interest is only compensatory in nature and not penal. As the CENVAT Credit in dispute was available to the appellant as rebate, no interest is imposable as the demand itself is not payable.

B. His second submission is that no penalty is liable to be imposed on the appellant since no mala fide intention is attributable to the appellant. Under Rule 173 Q of the Central Excise Rules, 1944 a entity is liable to pay penalty when it takes credit of duty or money, which he knows or which he has reason to believe, is not permissible under these Rules, or does not utilise the inputs or capital goods in the manner provided for in these rules, or utilises credit of duty or money in respect of inputs or capital goods in contravention of any of the provisions of these rules.

(i). According to the appellant, ingredients under Section 173 Q of Central Excise Rules, 1944 are not attracted. Appellant has not availed credit with the knowledge that availment of credit is impermissible, under the provisions of the Central Excise Rules, 1944 nor utilised the credit in contravention of the provisions under the said Rules.

C. His last submission would be that show cause notice does not mention imposition of penalty under Rule 13 of the CENVAT Credit Rules, 2001 and since it does not mention the specific Rule, penalty has been wrongly imposed and further availing financial accommodation, cannot be a ground to impose penalty under Rule 173 Q of Central Excise Rules, 1994.

15. Mr.A.P.Srinivas, learned counsel for the revenue would support the judgment of the Tribunal. According to the learned counsel for the revenue, there was no ambiguity in the definition of inputs and the absence of any ambiguity, appellant could not have treated the goods purchased for the purpose of exports as inputs.

16. Heard the learned counsel for the appellant and the respondent.

17. Rule 57 F & G, AH, 173 Q and Section 11 AC of the Central Excise Rules & Act read as under:-

Rule 57F: Manner of utilisation of the inputs and the credit allowed in respect of duty paid thereon -

(1) The inputs in respect of which a credit of duty has been allowed under Rule 57 A may -

(i). be used in, or in relation to, the manufacture of final products for which such inputs have been brought into the factory; or

(ii). Shall be removed, after intimating the Assistant Collector of Central Excise having jurisdiction over factory and obtaining a dated acknowledgement of the same, from the factory for home consumption or for export under bond, as if such inputs have been manufactured in the said factory.

Provided that where the inputs are removed from the factory for home consumption on payment of duty of excise, such duty of excise shall in no case be less than the amount of credit

that has been allowed in respect of such inputs under Rule 57 A.

(2). Notwithstanding anything contained in clause (ii) of sub-rule (1), the inputs in respect of which a credit of duty has been restricted in terms of proviso to Rule 57 A, may be removed after intimating the Assistant Collector of Central Excise having jurisdiction over the factory and obtaining dated acknowledgement of the same, from the factory for home consumption on payment of duty of excise equivalent to the credit availed on such inputs.

(3). Notwithstanding anything contained in sub-rule (1), a manufacturer may, after intimating the Assistant Collector of Central Excise having jurisdiction over the factory and obtaining dated acknowledgement of the same, remove the inputs as such, or after the inputs have been partially processed during the course of manufacture of final products, to a place outside the factory -

(a) for the purpose of test, repairs, refining, reconditioning or carrying out any other operation necessary for the manufacture of the final products and return the same to his factory for further use in the manufacture of the final product or remove the same without payment of duty under bond for export, provided that the waste, if any, arising in the course of such operation is also returned to the said factory;

(b). for the purpose of manufacture of intermediate products necessary for the manufacture of the final products and return the said intermediate products to his factory for further use in the manufacture of the final product or remove the same without

payment of duty under bond for export, provided that the waste, if any, arising in the course of manufacture of such intermediate products is also returned to the said factory.

Provided that the said waste need not be returned to the said factory if the appropriate duty of excise leviable thereon has been paid.

(4). Credit of specified duty allowed in respect of any inputs may be utilised towards payment of duty of excise -

(i). on any of the final products in or, in relation to the manufacture of which such inputs are intended to be used in accordance with the declaration filed under sub-Rule (1) of Rule 57 G; or

(ii). On the waste, if any, arising in the course of manufacture of the final products; or

(iii). On the inputs themselves if such inputs have been permitted to be cleared under sub-rule (1):

Provided that the credit of specified duty in respect of inputs used in the final products cleared for export under bond or used in the intermediate products cleared for export in accordance with sub-rule (2), shall be allowed to be utilised towards payment of duty of excise on similar final products clear for home consumption (or for export) on payment of duty and, where for any reason, such adjustment is not possible, by refund to the manufacturer subject to such safeguards, conditions and limitations as may be specified by the Central Government in the Official Gazette.

Provided further that no such refund of credit of duty shall be allowed if the manufacturer avails of drawback allowed under the Customs and Central Excise Duties (Drawback) Rules, 1971 or claims rebate of duty under Rule 12 A, in respect of such duty.

Provided also that the credit of specified duty in respect of inputs used in the final products cleared either to a unit in a Free Trade Zone or to a hundred per cent Export-Oriented Unit under bond shall be allowed to be utilised towards payment of

duty of excise on similar final products cleared for home consumption on payment of duty.

5. Any waste, arising from the processing of inputs, in respect of which credit has been taken may -

a. be removed on payment of duty as if such waste is manufactured in the factory; or

b. be removed without payment of duty, where it belongs to such class or category of waste as the Central Government may from time to time by order specify for the purpose for being used in the manufacture of the class or categories of goods as may be specified in the said order, subject to the procedure under Chapter X being followed, or

(c) be destroyed in the presence of proper officer on the application by the manufacturer, and if found unfit for further use, or not worth the duty payable thereon, the duty payable thereon being remitted:

Provided that such waste may be destroyed by the manufacturer governed by Chapter VII A after informing the proper officer in writing regarding the quantity of such waste and the date on which he proposes to destroy, at least seven days in advance and after observing all such conditions as may be prescribed by the Collector of Central Excise by a general or special order with regard to the manner of disposal of such waste.

6. No part of the credit of duty allowed shall be utilised save as provided in sub-rule (3).

7. On an application made by a manufacturer, the Collector may, subject to such conditions and limitations as he may impose, permit a manufacturer having credit in his account in form R.G.23 A and lying unutilised on account of shifting of the plant or factory, belonging to the manufacturer, to another site, to transfer the credit in the account aforesaid to such factory of the same manufacturer.

8. The credit of Special duty of excise paid on inputs on or prior to the 28th day of February 1993 may be utilised towards payment of duty on final products cleared subsequent to 28th day of February, 1993 but prior to the

31st day of March, 1994, for the manufacture of which such inputs were permitted to be brought into the factory.

Rule 57 G - Procedure to be observed by the manufacturer -

(1). Every manufacturer intending to take credit of the duty paid on inputs under Rule 57 A, shall file a declaration with the Assistant Collector of Central Excise having jurisdiction over his factory, indicating the description of the final products manufactured in his factory and the inputs intended to be used in each of the said final products and such other information as the said Assistant Collector may require, and obtain a dated acknowledgement of the said declaration.

(2). A manufacturer who has filed a declaration under sub-Rule (1) may, after obtaining the acknowledgement aforesaid, take credit of the duty paid on the inputs received by him:

Provided that no credit shall be taken unless the inputs are received in the factory under the cover of an invoice, issued under Rule 52 A, and R-1, or Bill of Entry or any other documents as may be prescribed by the Central Government by notification in the Official Gazette in this behalf evidencing the payment of duty or such inputs.

Provided further that having regard to the period that has elapsed since the duty of excise was imposed on any inputs, the position of demand and supply of the said inputs in the country and any other relevant considerations, the Central Government may direct that with effect from a specified date, all stocks of the said inputs in the country, except such stocks lying in a factory, customs area (as defined in the Customs Act, 1962 (52 of 1962) or a warehouse as are clearly recognisable as being non-duty paid, may be deemed to be duty-paid and credit of duty in respect of the said inputs may be allowed at such rate and subject to such conditions as the Central Government may direct, without production of documents evidencing the payment of duty:

Provided also that the manufacturer shall take all reasonable steps to ensure."

Rule 57 AH. Recovery of credit wrongly taken:-

"(1) Where the CENVAT credit has been taken or utilised wrongly, the same along with interest shall be recovered from the manufacturer and the provisions of Sections 11A, 11AA and 11AB of the Act shall apply mutatis mutandis for effecting such recoveries.

(2) Where the CENVAT credit has been taken or utilized wrongly on account of fraud, willful misstatement, collusion or suppression of facts, or contravention of any of the provisions of the Act or the rules made thereunder with intention to evade payment of duty, then, the manufacturer shall also be liable to pay penalty and the provisions of section 11AC of the Act shall apply mutatis mutandis."

"173Q. Confiscation and penalty.-

(1) Subject to the provisions contained in section 11AC of the Act and rule 57AH, if any manufacturer, producer, registered person of a warehouse or a registered dealer,-

(a) removes any excisable goods in contravention of any of the provisions of these rules; or

(b) does not account for any excisable goods manufactured, produced or stored by him; or

(bb) takes credit of duty or money in respect of inputs or capital goods for being used in the manufacture of final products or capital goods for use in the factory of the manufacturer of final product, as the case may be, wrongly or without taking reasonable steps to ensure that appropriate duty on the said inputs or capital goods has been paid as indicated in the invoice or any other document approved under these rules evidencing the payment of excise duty or the countervailing duty, as the case may be, accompanying thereof, or takes credit of duty or money which he knows or which he has reason to believe, is not permissible under these rules, or does not utilise the inputs or capital goods in the manner provided for in these rules, or utilises credit of duty or money in respect of inputs or capital goods in contravention of any

of the provisions of these rules, or does not render proper and true account of the receipt and disposal of the said inputs or capital goods and the credit of duty or money taken thereon as required under these rules, or contravenes any of the provisions contained in Section AA or AAA of Chapter V of these rules; or

(bbb) enters wilfully any wrong or incorrect particulars in the invoice issued for the excisable goods dealt by him with intent to facilitate the buyer to avail of credit of the duty of excise or the additional duty under section 3 of the Customs Tariff Act, 1975 (51 of 1975) in respect of such goods which is not permissible under these rules; or

(c) engages in the manufacture, production or storage of any excisable goods without having applied for the registration certificate required under section 6 of the Act; or

(d) contravenes any of the provisions of these rules with intent to evade payment of duty,

then, all such goods shall be liable to confiscation and the manufacturer, producer, registered person of a warehouse or a registered dealer, as the case may be, shall be liable to a penalty not exceeding the duty on the excisable goods in respect of which any contravention of the nature referred to in clause (a) or clause (b) or clause (bb) or clause (c) or clause (d) has been committed, or ten thousand rupees, whichever is greater.

then, all such goods shall be liable to confiscation and the manufacturer, producer, registered person of a warehouse or a registered dealer, as the case may be, shall be liable to a penalty not exceeding the duty on the excisable goods in respect of which any contravention of the nature referred to in clause (a) or clause (b) or clause (bb) or clause (c) or clause (d) has been committed, or ten thousand rupees, whichever is greater.

Explanation.—For the purposes of clause (bb) of sub-rule (1), a person availing of credit of duty on inputs received by him shall be deemed to have taken "reasonable steps" if he satisfies himself about the identity and address of the manufacturer or supplier, as the case may be,

issuing the invoice or any other document approved under these rules evidencing the payment of excise duty or the countervailing duty, as the case may be, either-

(a) from his personal knowledge; or

(b) on the strength of a certificate given by a person with whose handwriting or signature he is familiar; or

(c) on the strength of a certificate issued to the manufacturer or the supplier, as the case may be, by the Superintendent of Central Excise within whose jurisdiction such manufacturer has his factory or the supplier has his place of business:

Provided that where the identity and address of the manufacturer or the supplier is satisfied on the strength of a certificate, the person availing of credit of duty shall retain such certificate for production before the proper officer on demand.

(2) Where

(a) in the case of a contravention of the nature referred to in clause (a) or clause (b) or clause (c) or clause (d) of sub-rule (1), the duty leviable on the excisable goods referred to in that sub-rule exceeds one lakh of rupees, or

(b) any manufacturer, producer, registered person of warehouse or a registered dealer, whose excisable goods were confiscated under sub-rule (1) and upon whom a penalty was imposed under that sub-rule, contravenes against any of the provisions of clause (a) or clause (b) or clause (c) or clause (d) of sub-rule (1) and the duty leviable on the excisable goods in respect of the contravention for the second or any subsequent occasion exceeds ten thousand rupees, then, in a case falling under clause (a) of this sub-rule or in a case falling under clause (b) thereof (whether the contravention under that clause has been committed for the second or any subsequent occasion), the officer adjudging the case under section 33 of the Act may, in addition to the award of confiscation and penalty under sub-rule (1), direct, for reasons to be recorded in writing, the confiscation of any or all of the following belonging to such manufacturer, producer, registered person of a warehouse or a registered dealer, namely:-

- (i) any land, building, plant, machinery, materials, conveyance, animal or any other thing used in connection with the manufacture, production, storage, removal or disposal of such goods, or
- (ii) any other excisable goods on such land, or in such building or produced or manufactured with such plant, machinery, materials or thing.

11 AC. Penalty for short-levy or non-levy of duty in certain cases.-

Where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reasons of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, the person who is liable to pay duty as determined under sub-section (2) of section 11A, shall also be liable to pay a penalty equal to the duty so determined: Provided that where the duty determined to be payable is reduced or increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the Court, then, for the purposes of this section, the duty, as reduced or increased, as the case may be, shall be taken into account:

18. The two short questions that arises for consideration is

- i) "whether the appellant could take CENVAT Credit for the goods exported from the KDP Plant" and
- ii) "Whether penalty can be imposed on the appellant in the facts and circumstances of this case"

19. The finding of facts by the Courts below would show that the appellant used to receive bought out auto components against the specific purchase orders, (coated with rust-proof oil) and random-testing, sequencing and packing/palleting the same for the purpose of exports. These goods were stacked together in containers and exported without payment of duty. Scrutiny of purchase orders of the appellant, invoices of their vendors and the agreement between appellant and M/s.TVS which were examined by the Department found that KDP Plant

had been set up, for the purpose of exporting to South Africa and Mexico. This would demonstrate that KDP Plant was set up only for trading activity. It was not a factory. There was no

manufacture activity. The appellant could not produce any material to substantiate that activity undertaken at KDP Plant was a process connected with or incidental or ancillary to the production of cars in the factory. Appellant therefore, could not bring the activity done in KDP Plant within four corners of "deemed manufacture" applicable to inputs removed as such from a factory for the simple reason that KDP Plant was not a factory where manufacturing was taking place.

20. Board, in a letter, dated 30/1/2002, has clarified that when the goods procured solely for the purpose of export and were not intended for use in the manufacture of final products, CENVAT credit was not available. This view taken by the Board stands and has not been set aside by any Court. The appellant has therefore, taken CENVAT Credit and have utilised it for their benefit, thereby causing loss to the revenue. The fact that they have reversed the credit taken is of no consequence. In view of the finding of facts by the authorities, contentions advanced by the appellant cannot be sustained. The fact that show cause notice does not mention the provision is also of no consequence or significance.

21. Knowing fully well about the nature of activity, appellant has contravened the provisions of Rule 11 of the Rules and therefore, made themselves liable under the provisions of Rule 173 Q of the Central Excise Rules, 2002. Penalty is a consequence of violation of the Rules and non-mentioning of the Rules while imposing penalty or of the provision regarding interest, does not absolve a person who knowingly evaded from payment of the same and the allegation in the show cause notice, makes the exact nature of provision clear and that the appellant has been communicated in no uncertain terms, the allegations made against him and the Rules contravened by him. No prejudice is therefore, caused to the appellant, by not mentioning the Rules, attract penalty or interest in the show cause notice.

22. Civil Miscellaneous Appeals are therefore, dismissed with no order as to costs.

Sd/-
Assistant Registrar(CS)

//True Copy//

Sub Assistant Registrar

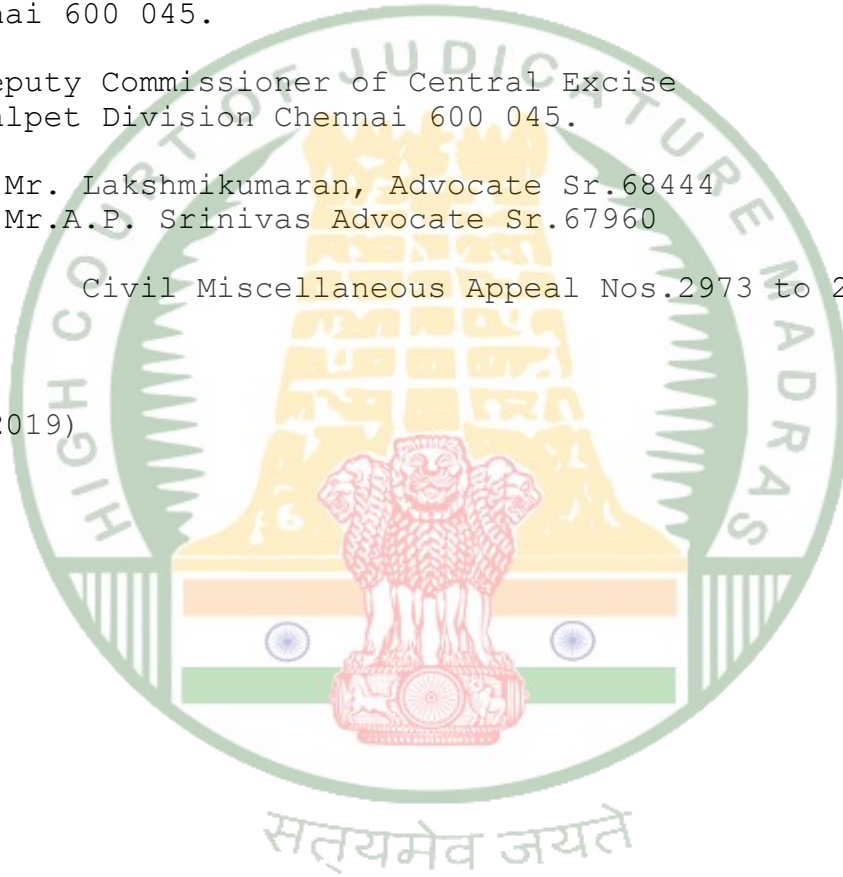
mvs.

To

1. The Customs, Excise and Service Tax Appellate Tribunal,
South Zone Bench, Shastri Bhavan Annexe 1st floor,
26 Heddows Road,
Chennai 600 006.
 2. The Assistant Commissioner of Central Excise
Chengelpet Division
Chennai 600 045.
 3. The Deputy Commissioner of Central Excise
Chengalpet Division Chennai 600 045.
- + 1 cc to Mr. Lakshmikumaran, Advocate Sr.68444
+ 1 cc to Mr.A.P. Srinivas Advocate Sr.67960

Civil Miscellaneous Appeal Nos.2973 to 2975 of 2007

JP(CO)
EU(18/01/2019)



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