

AFR**HIGH COURT OF CHHATTISGARH, BILASPUR****TAXC No. 47 of 2017**

1. M/s SKS Ispat & Power Ltd. A Company Incorporated Under The Companies Act, 1956 Having Its Office At Phase II, Industrial Growth Centre, Siltara, Raipur, Chhattisgarh 493111, Through Its Authorized Signatory And Vice President (Accounts And Tax) Gopal Garg, S/o Shri R.N. Garg, Aged About 54 Years, R/o B2/601, VIP Karishma, Shankar Nagar, Raipur, Chhattisgarh.

---- Appellant**Versus**

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

---- Respondent

For Appellant
For Respondent

Shri Neelabh Dubey, Advocate
Shri Vinay Pandey, Advocate

Hon'ble Shri Justice Prashant Kumar Mishra**Hon'ble Shri Justice Parth Prateem Sahu****Judgment on Board****By****Prashant Kumar Mishra, J.****26/03/2019**

1. This appeal under Section 35G of the Central Excise Act, 1944 (for short 'the Act, 1944') would call in question the legality and validity of the appellate order passed by the Customs, Excise & Service Tax Appellate Tribunal (for short 'the CESTAT') refusing to accept the appellant's contention

that demand of Rs.24,34,593/- out of total demand of Rs.99,21,728/- as credit for '*activities relating to business*' is not available to the appellant even though the said part of the demand was made after the normal period of limitation by invoking the provisions of Section 11A of the Act, 1944 read with Section 73 of the Finance Act, 1994 (for short 'the Act, 1994').

2. This appeal was admitted on the following substantial question of law :

“Whether on the facts and in the circumstances of the case, the Tribunal is justified in holding that the action taken to reopen the proceedings was within the permissible period under Section 11A of the Central Excise Act, or under Section 73 of the Finance Act; of which latter provision was not referred by the Department while initiating or carrying forward the proceedings?

3. The period involved in this appeal is April, 2009 to March, 2011. During this period the appellant availed the CENVAT credit to the tune of Rs.99,21,728/- on service tax on freight paid on outward transportation up to the place of removal. There were other credits availed by the appellant, which has

been disallowed by the Commissioner and thereafter, by the CESTAT, however, the other demands are not in question before us. We are only concerned with credit to the tune of Rs.24.34.593/-.

4. Initially, the assessee contested the entire demand and its argument to the extent of credit to the tune of Rs.64,61,697/- and Rs.3,99,357/- was allowed holding the appellant to be eligible for credit towards service tax on freight paid up to the place of removal. Remaining amount of Rs.24,34,593/- was not allowed to be credited in appellant's favour, therefore, this demand was contested by the appellant only on the ground of limitation.
5. Shri Neelabh Dubey, learned counsel appearing for the appellant, would submit that the finding in paras 6 & 7 of the CESTAT's order is without any foundation as to how the appellant acted *mala fide*ly or misled the Commissioner while availing credit, therefore, there is no foundation for invoking Section 11A of the Act, 1944 read with Section 73 of the Act, 1994. Shri Dubey would further submit that during the relevant period judgment rendered by the CESTAT, South Zonal Bench, Bangalore (Larger Bench) in **ABB Ltd. v Commissioner of C.Ex. & S.T., Bangalore**¹ was operative,

¹ 2009 (15) STR 23 (Tri.-LB)

therefore, the appellant was under *bona fide* belief that the appellant is entitled to credit showing the freight charges paid to the transporter as an '*activity relating to business*'.

6. Shri Vinay Pandey, learned counsel appearing for the respondent, *per contra*, would support the impugned order and contest the substantial question of law on submission that the appellant was fully aware that the subject activity was not an activity relating to business and yet availed the credit, therefore, he himself misled the authorities for availing the credit, hence Section 11A of the Act, 1944 read with Section 73 of the Act, 1994 has rightly been invoked.
7. Having heard learned counsel for the parties and on perusal of the orders passed by the larger Bench of the CESTAT in **ABB Ltd.** (supra) and thereafter, the High Court of Karnataka's order in the said matter (Commissioner of C.Ex. & S.T., LTU, Bangalore v ABB Limited²), we are convinced that the appellant was not guilty of acting *mala fide*ly or suppressing or misleading the department. We say so because during the currency of the relevant period i.e. April, 2009 to March, 2011 the subject activity was treated to be an activity relating to business by the larger Bench of the CESTAT in **ABB Ltd.** (supra). This judgment was rendered on 18-5-2009. The

² 2011 (23) STR 97 (Kar.)

CESTAT had held that the services availed by a manufacturer for outward transportation of final products from the place of removal should be treated as an input service in terms of rule 2(1)(ii) of the CENVAT Credit Rules, 2004 enabling the manufacturer to take credit of the service tax paid on the value of such services. However, on appeal by the Revenue the High Court of Karnataka set aside the order passed by the larger Bench of the CESTAT to hold that the manufacturer is not entitled to avail such transportation charges. If any assessee was under *bona fide* belief on account of law laid down by the larger Bench of the CESTAT, the converse is not true, meaning thereby that the assessee was not acting *mala fide* nor had suppressed any fact or mislead the department while availing the credit for an item which was held to be available as eligible to avail credit by the CESTAT itself. If the law was subsequently declared in favour of the Revenue by the High Court that would not relate back to the period of assessment to brand the assessee's action of availing credit as *mala fide*. Therefore, the present is not a case where the Revenue would be entitled to invoke the provisions of Section 11A of the Act, 1944 read with Section 73 of the Act, 1994 as there is no foundation for invoking the provision.

8. For the foregoing, we allow the appeal and answer the substantial question in favour of the assessee and against the Revenue to hold that Section 11A of the Act, 1944 read with Section 73 of the Act, 1994 was not invokable and the subject demand could not have been raised, as being barred by limitation.

Sd/-

Judge
Prashant Kumar Mishra

Sd/-

Judge
Parth Prateem Sahu

Gowri