



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 29.03.2021

CORAM:

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

W.P.(MD)No.25108 of 2018

and

W.M.P.(MD)No.22738 of 2018

M/s.TVS Srichakra Limited
Represented by its Authorised Signatory,
Mr.K.V.Ganesh,
No.1, Perumalpatti Road,
Vellaripatti Village, Melur Taluk,
Madurai 625 122.

... Petitioner

-Vs-

The Commissioner of CGST and Central Excise,
Central Revenue Buildings, B.B.Kulam,
Madurai 625 002.

... Respondent

PRAYER: Petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorarified Mandamus, to call for the records in file No.V/40/15/70/2014-Adjn comprising of Order-in-Original No.MDU-CEX-COM-60/2018, dated 28.09.2018 passed by the respondent herein and quash the same as arbitrary and violative of the order dated 23.02.2018 of this Court and consequently, direct the respondent herein to pass a fresh order strictly complying with the guidelines provided by this Court.

For Petitioner : Mr.S.Muthuvenkataraman

For Respondent : Mrs.S.Ragaventhre

ORDER

Heard the learned counsel appearing for the petitioner and the learned Standing Counsel appearing for the respondent.

2.The petitioner is engaged in manufacture of various types of tyres and tubes. The petitioner is having their factory premises at Vellaripatti in Madurai. The petitioner was having liquidity issue. The petitioner therefore entered into negotiation with M/s.CBC Assets Solutions Private Limited which is a finance

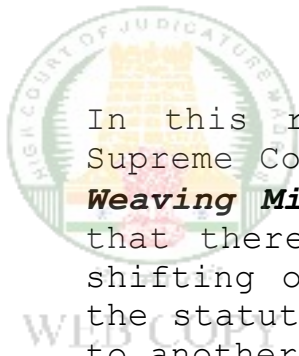


enterprise. As per the agreement between the parties, the petitioner was to sell their plant and machinery for a particular consideration. The financier was to enter into Master Rent Agreement with the petitioner, thereby, leasing the sold out assets. Such a Master Rent Agreement was entered into between the parties on 25.02.2013 but came into effect on 01.04.2013. The petitioner sold the plant and machinery as evidenced by the Commercial Sale Invoice dated 22.03.2020 in favour of M/s. OPC Assets Solutions Private Limited for a sum of Rs.55,30,00,000/-. While so, the respondent herein issued show cause notice No.6 / 2016, dated 21.12.2016 seeking to reverse the credit already availed by the petitioner on the sold out capital goods. The petitioner offered their reply. Not satisfied with the same, the respondent proceeded to pass order dated 31.10.2017 confirming the proposal set out in the show cause notice. Questioning the same, the petitioner filed W.P.(MD)No.2131 of 2018. Vide order dated 23.02.2018, the order passed by the respondent was set aside and the matter was remitted to the file of the respondent to pass orders afresh and in accordance with law. The respondent was also directed to afford an opportunity of personal hearing to the petitioner herein. Post remand, the petitioner was afforded an opportunity of hearing. But the adjudicating authority chose to reiterate the earlier stand. The impugned order dated 28.09.2018 came to be passed once again confirming the proposals set out in the show cause notice. The same is assailed in the writ petition.

3.The respondent has filed a detailed counter affidavit. The learned standing counsel would point out that the order impugned in the writ petition is very much an appealable order and therefore, this Court may not entertain the writ petition.

4.I carefully considered the rival contentions and went through the materials on record. The issue raised in the writ petition lies within the very narrow campus. There is no dispute that the petitioner had sold their plant and machinery in favour of M/s.OPC Assets Solutions Private Limited on 22.03.2013. There is again no dispute that with effect from 01.04.2013, the sold out assets, plants and machinery were leased back in favour of the petitioner by M/s.OPC Assets Solutions Private Limited. The authority has proceeded on the footing that as a result of these transactions, there was a deemed removal of goods from the factory premises of the petitioner herein and therefore, excise duty became leviable. It was from that perspective, the reversal of CENVAT came to be made.

5.The core contention of the petitioner's counsel is that the Central Excise Act does not contemplate any deemed removal. Only if there is physical removal of the capital goods / assets from the factory premises, excise duty can be levied and not otherwise.



In this regard, he drew my attention to the decision of the Supreme Court reported in **1987 (32) ELT 234(SC) (J.K.Spinning and Weaving Mills Limited)**. In Para No.38, it was specifically held that there can be no doubt that the word 'removal' contemplates shifting of a thing from one place to another. In other words, the statute contemplates physical movement of goods from one place to another.

6.The learned counsel would further point out that the Division Bench of the Madras High Court, in the decision reported in **2015 (323) E.L.T. 290 (Mad.) (Commissioner of C.EX., Tiruchirapalli, vs. CESTAT, Chennai)**, had also taken the very same view. Paragraph Nos.15, 16, 17 & 18 of the said decision read as follows:-

"15.On the questions of law framed above, at the outset, it is brought to the notice of this Court that the decision of Majestic Auto Case (supra), which was relied upon by the jurisdictional Commissioner has since been reversed by the Allahabad High Court in Hero Motors Ltd., Vs. Commissioner of Central Excise, Ghaziabad (2014) (310) E.L.T 729. A cursory glance at the said decision would reveal that the case was also a case of lease and in circumstances, the Allahabad High Court held as under:-

22.In the present case we find substance in the contention of Shri Bharat Ji Agarwal that at the time of obtaining registration HBSA Pvt. Ltd., had submitted a ground lay out plan, which was approved by the Superintendent, Customs and Central Excise, Range-6, Division-III, Ghaziabad on 21.08.1998 and in which the engine assembly on ground floor in the premises of Majestic Auto Limited was clearly demarcated. The plant and machinery was installed and was never removed from the premises. The I.C. Engines manufactured by HBSA Pvt. Ltd., in the same premises were used by the appellant. Once it was admitted that the capital goods, on which, Modvat Credit was taken by the appellant remained installed in the same premises, which was leased out and continued to be engaged in the manufacture of I.C.Engine, which was further used in the manufacture of two wheelers and that a separate registration certificate was obtained by HBSA Pvt., Ltd., there was no removal of goods. The capital goods remained installed in the same premises and thus even if the premises were transferred on lease, the capital goods even if they were deemed to be installed in the premises of HBSA Pvt., Ltd., Rule 57-S, would not be attracted.

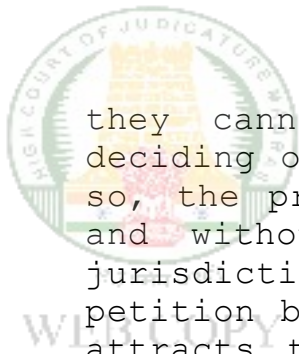


16. On a plain reading of Rule 3(5) of the Cenvat Credit Rules, 2004, we find that Rule 3(5) only speaks about the removal of goods under cover of invoice referred to in Rule 9 on inputs or capital goods on which cenvat credit has been taken and if such goods are removed as such from the factory or provider of output service, shall be liable to pay an amount equal to the credit availed in respect of such inputs or capital goods.

17. In this case, we find there is no removal of goods under cover of invoice as provided under Rule 9 of the Cenvat Credit Rules, 2004 and there is nothing in Rule 3(5) of the Cenvat Credit Rules, 2004 to invoke the deeming fiction as insisted by the adjudicating authority. The language of Rule 3(5) is plain and simple. When the inputs or capital goods on which cenvat credit has been taken are removed as such from the factory, then subject to compliance of other requirements, the credit availed in respect of inputs on capital goods shall be paid. This situation has not arisen in the present case, as no invoice has been issued for removal of the goods from the factory premises and therefore, the said rule is not applicable to the case of the assessee.

18. The above is the view succinctly expressed by the Allahabad High Court in Hero Motors case (supra). This Court is in agreement with the view expressed by the Allahabad High Court in the above-cited decision and the above decision is squarely applicable to the facts of the present case. In view of the above, the interpretation with regard to Rule 3(5) of CCR, 2004, as made by the Tribunal in the present case is fully justified and it calls for no interference at the hands of this Court."

7. My attention is drawn to Circular No.1063/2/2018-CX, dated 16.02.2018, issued by the Central Board of Excise and Customs, in which, it has been stated that the Department has accepted the aforesaid decision of the Madras High Court. The contention of the petitioner's counsel is that the respondent is squarely bound by the decision rendered by the Madras High Court. It is not open to the respondent to disregard the aforesaid binding decision rendered by the Division Bench in *M/s. Dalmia Cements Case*. Moreover, the Central Board of Excise and Customs has mandated that the adjudicating authority shall decide the cases falling within their jurisdiction in that light. The learned counsel would also draw my attention to the decision of the Supreme Court reported in **1983 (13) E.L.T 1342 (S.C) (East India Commercial Co. Ltd., Calcutta Vs. Collector of Customs, Chennai)**, in which, it was held that the law declared by the highest Court in the State is binding on all authorities or tribunals under its superintendence and that



they cannot ignore it either in initiating a proceeding or deciding on the rights involved in such a proceeding. If that be so, the proceedings of the authority themselves would be invalid and without jurisdiction. When the proceedings are without jurisdiction, the writ Court can always entertain the writ petition by dispensing with alternative remedy. The case on hand attracts the parameters laid down by the Hon'ble Judges of the Division Bench in *Mahindra & Mahindra Ltd., case*.

8.The petitioner's counsel lamented that in the previous round itself, this Court, vide order dated 23.02.2018, had highlighted the very same principles. In paragraph No.8, the aforesaid Division Bench decision of the Madras High Court was referred to. Likewise, the decision of Allahabad High Court in ***(Hero Motors Ltd., Vs. Commissioner of Central Excise, Ghaziabad (2014) (310) E.L.T 729)***, was also referred to. Yet the adjudicating authority has chosen to disregard the said principle and hold that the cenvat credit availed by the petitioner is liable to be reversed by applying the deemed removal principle.

9.I am satisfied that the adjudicating authority has totally ignored the directions given by this Court on the earlier occasion. Therefore, I am inclined to interfere with the impugned order. The order impugned in the writ petition is quashed. The matter is remitted to the file of the respondent. The respondent will bear in mind the Circular No.1063/2/2018-CX dated 16.02.2018 issued by the Central Board of Excise and Customs, while deciding the issue. The Writ Petition is allowed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (Crl Side)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

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Note:In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.



To

The Commissioner of CGST and Central Excise,
Central Revenue Buildings, B.B.Kulam,
Madurai 625 002.

WEB COPY

+1 CC to M/s.S.P.MAHARAJAN, Advocate (SR-14288[F] dated
30/03/2021)

W.P. (MD)No.25108 of 2018

and

W.M.P. (MD)No.22738 of 2018

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VB(03/06/2021) 6P / 3C