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**(2005) 09 DEL CK 0091**

**In the Delhi High Court**

**Case No : Writ Petition (C) No. 19539 of 2005**

Bharat Starch Industries

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

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**Date of Decision : 30-09-2005**

**Acts Referred:**

Central Excises and Salt Act, 1944 — Section 35B, 35F

CENVAT (Credit) Rules, 2002 — Rule 6, 6(3)

CENVAT (Credit) Rules, 2004 — Rule 6(3)(b)

**Citation : (2006) 198 ELT 190**

**Hon'ble Judges : T.S. Thakur, J;Badar Durrez Ahmed, J**

**Bench : Division Bench**

**Advocate : J. Vellapali and S.S. Mishra, for the Appellant; Meera Bhatia, for the Respondent**

**Final Decision : Dismissed**

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## **Judgement**

T.S. Thakur, J.—Aggrieved by a show cause notice issued by the Commissioner of Central Excise & Customs, Panchkula, the petitioner rushed to this Court to file W.P. No. 8099/2005, inter alia, contending that Rule 6 of Cenvat Credit Rules, 2002 was ultra virus the provisions of the Central Excise Act. The said petition was, eventually dismissed by this Court on 9-5-2005 as withdrawn reserving liberty to the petitioner to challenge the virus of the provisions after the competent authority considered the reply submitted by the petitioner to the show cause notice. Upon examination of the objections filed by the petitioner, the Commissioner has passed an order on 26-7-2005 rejecting the contentions urged by the petitioner and demanding duty and as also levying penalty under the relevant Rules. That order is admittedly appealable before the Central Excise and Service Tax Tribunal u/s 35B of the Central Excise Act. The petitioner has not, however, preferred any such appeal. It has on the contrary filed the present writ petition and made the following prayers in the same:

(a) Issue a writ in the nature of Certiorari declaring Rule 6(3)(b) of Cenvat Credit

Rules, 2002 and 6(3)(b) of Cenvat Credit Rules, 2004 to be unconstitutional being ultra virus the Constitution of India and the Central Excise Act, 1944;

(b) read down Rule 6 by holding that it applies only to inputs used directly in the manufacture of dutiable excisable goods;

(c) direct the Customs Excise and Service Tax Appellate Tribunal to hear the petitioner's appeal against the Order of the Commissioner dated 26-7-2005 restricting the application of Rule 6 to only direct inputs;

(d) quash all the proceedings pursuant to the Show Cause notices dated 7-12-2004, 3-6-2005, 3-5-2005, 28-2-2005, 27-12-2004 and 28-2-2005 in the alternative; and

(e) pass such other and further orders as may deem fit and proper in the facts and circumstances of the case.

2. Appearing for the petitioner, J. Vellapali, Sr. Advocate strenuously argued that the interpretation placed by the Commissioner on the provisions of Rule 6(3)(b) of the Cenvat Credit Rules, 2002 and Rule 6(3)(b) Cenvat Credit Rules, 2004 was erroneous, irrational and wholly unsustainable. Alternatively he argued that if the interpretation placed by the Commissioner was taken as correct, Rule 6(3)(b) will be rendered ultra virus of the provisions of the Central Excise Act. He submitted that although the alternative interpretation of the Rules as suggested by the petitioner could be urged before the Tribunal in an appeal against the impugned order passed by the Commissioner, any such exercise would be futile in the light of an earlier decision of the Tribunal in 2004 (170) ELT 580 Relying upon the decision of the Supreme Court in the case of Filterco and Another Vs. Commissioner of Sales Tax, Madhya Pradesh and Another, , Mr. Vellapali submitted that this Court could entertain a writ petition at this stage and examine the constitutionality of the Rules mentioned above as also the correctness of the interpretation placed by the Commissioner on the said rule.

3. We have given our anxious consideration to the submissions made by Mr. Vellapali but regret our inability to accept the same. It is common ground that the order passed by the Commissioner which determines the duty payable by the petitioner and levies penalty on it, it is appealable before the Tribunal u/s 35F of the Act. Any argument touching the interpretation of the provisions under which the said liability has been determined or penalty levied is, Therefore, a matter which ought to be more appropriately urged before the Tribunal in any such appeal. The submission of Mr. Vellapali that an exercise in appeal would be futile in the light of the previous decision of the Tribunal has not impressed us. It is true that the Tribunal has in the case refer to by Mr. Vellapali upheld an order determining the liability of the appellant in that case under Rule 6(3)(b) of the Cenvat Credit Rules but it is also clear from a reading of the said order that the interpretation which Mr. Vellapali has so forcefully urged before us was not noticed or advanced before the Tribunal. Whether or not that interpretation is a logical view that can be taken by the Tribunal while applying Rule 6 of Cenvat

Credit Rules, 2002 and 2004 is Therefore a question which remains open and need not be prejudged by this Court. That apart the question whether Rules 6(3) (b) Cenvat Credit Rules suffers from any vice of unconstitutionality may fall for consideration only if the petitioner's interpretation of the said provision is not accepted by the Tribunal. So long as the petitioner has the remedy of an appeal in which the relief may be granted by the authority competent to hear such an appeal, the question of examining the virus of the provision on the assumption that the interpretation offered by the petitioner will be rejected does not arise. As observed by this Court while dismissing the earlier writ petition, the question of virus under Rule 6(3)(b) can be raised by the petitioner if the necessity to do so arises. That necessity has not in our opinion arisen so far.

4. This petition accordingly fails and is hereby dismissed with liberty to the petitioner to file an appeal before the Tribunal and to assail the constitutional validity of Rule 6(3)(b) of the Cenvat Credit Rules if the necessity to do so arises. No costs.