**(2010) 03 MAD CK 0205**

**In the Madras High Court**

**Case No :** Writ Petition No. 2831 of 2010

Global Stamping and Welding Automotive P. Ltd. APPELLANT

Vs

C.B.E. and C. RESPONDENT

**Date of Decision :** 29-03-2010

**Acts Referred:**

Central Excise Rules, 2002 — Rule 12CC, 9
Central Excises and Salt Act, 1944 — Section 10
Central Sales Tax Act, 1956 — Section 10A
CENVAT (Credit) Rules, 2004 — Rule 12AA, 3(5)

**Citation :** (2010) 256 ELT 3

**Hon'ble Judges :** Chitra Venkataraman, J

**Bench :** Single Bench

**Advocate :** V. Balasubramanian, for the Appellant; P. Mahadevan, SCGSC, for the Respondent

**Final Decision :** Allowed

# Judgement

Chitra Venkataraman, J.—The petitioner herein is engaged in the manufacture and sale of motor vehicle components. During the period

May, 2009 to October 2009, the petitioner availed Cenvat credit as regards certain inputs viz., CR coils.

2. On 29-10-2009, the officers of the Preventive Wing visited the factory premises wherein it was found that the assessee had cleared inputs i.e.,

CR sheets in coil form as such, without paying any duty equal to the credit availed in terms of Rule 3 Sub-rule (5) of the Cenvat Credit Rules,

2004. It is admitted by the petitioner that the items were diverted as such on payment of Central excise duty applicable for the finished goods. The

removal had been reflected in the ER-1 returns every month.

3. A statement was recorded from the petitioner represented by its General

Manager (Finance and H.R.) that the adoption of the rate of 8%

excise duty for diversion of inputs as such, was a mistake due to the invoice raised in the computer system, treating the input as a manufactured

item. The failure of reversal of actual credit availed by them was admitted by the petitioner. On the very next day of inspection, the differential duty

for the post removal worked out to Rs. 19,41,917/- was paid on 31-10-2009. They had also written a letter on 3-11-2009 to the respondents to

condone the inadvertent error. The interest thereon was also remitted to the tune of Rs. 52,377/- on 25-11-2009.

4. In the background of the said facts, the petitioner received an intimation on 20-11-2009 proposing to impose deterrent measures as

contemplated under Notification No. 32/2006-C.E. (N.T.), dated 30-12-2006 as amended by Notification No. 15/2009-C.E. (N.T.), dated 10-

6-2009 for the said violation. The petitioner explained that the mistake had occurred only due to the system generated invoices treating the goods

as finished goods and that there was no mistake committed knowingly and hence prayed for dropping of the action.

5. The petitioner submitted that due to oversight, on the inadvertent system error, the petitioner failed to notice that some of the inputs removed as

such were received from registered dealer at the old rate of 14%/10% and while clearing such goods, they debited duty at the rate applicable then

at 8%. Immediately on coming to know of the mistake, they had calculated the differential duty that was short-debited to the tune of Rs.

19,41,917/- and debited the same without any delay. In the circumstances, the petitioner sought for dropping of the proceedings, as there was no

intention. The petitioner also admitted the mistake of not debiting 4% additional customs duty.

6. The prayer of the petitioner was, however, rejected by the respondents that the act of the petitioner in showing excise duty at 8% for the

purpose of calculation of differential amount was only a deliberate act employed by the petitioner with the intention of partially retaining the credit

of duty paid on inputs, that were cleared as such.

7. An order was however passed rejecting the prayer on 8-2-2010 restraining the petitioner from availing the facility of monthly payment of excise

duty and forcing the petitioner to pay the duty for each removal on daily basis with effect from 15-2-2010 to 31-5-2010. Apart from that, the

petitioner was directed not to utilise the CENVAT credit between 15-2-2010 and 31-5-2010 and filed the intimation to the jurisdictional

Superintendent of Central Excise as regards the receipt of the inputs within 24 hours. The petitioner stated that they had Rs. 6.5 crores CENVAT

credit as on 31st January, 2010 and that the order has sought, to block the said credit, apart, from prohibiting the availment of future input credit

between 15-2-2010 and 31-5-2010.

8. It is seen from the order that, the respondents came to a prima facie conclusion holding that the petitioner knowingly indulged in the above-said

violation constituting an offence under Clause (g) of Para 1 of the notification in the calculation of duty at 8% instead of 10% to 14% with

additional duty of customs at 4% as applicable at the time of procurement. The respondents recovered 33 invoices evidencing that the inputs were

cleared as such without payment of the amount equal to the credit availed. The respondents also referred to the statement of the General Manager

(Finance) recorded on 11-11-2009, wherein, he admitted as to the non-payment of amount equal to the credit availed on the inputs cleared as

such to M/s. Technical Stampings Automotive Ltd.

9. Learned Counsel appearing for the petitioner submits that the failure to reverse the duty equal to the Cenvat credit on the input was unintentional

and that it was only on account of the computer generated invoices calculating the duty at the current rate that had resulted in the mistake of short-

payment; consequently, there being no mala fide intention to defraud the Revenue. This is evident from the fact that the petitioner had immediately

paid the differential duty; consequently, there was no ground for taking any punitive action against the petitioner.

10. Learned Counsel appearing for the petitioner pointed out that the Notification No. 32/2006-C.E. (N.T.), dated 30-12-2006 applies only to

such cases where the manufacturer is prima facie found knowingly involved in committing the offence. In the absence of any motive shown and the

explanation made, the proceedings are liable to be set aside. In this connection, learned Counsel placed reliance on the decision of the Bombay

High Court reported in 2009 (234) E.L.T. 578 (Hiren Aluminium Ltd. v. Union of India); particularly paragraphs 18, 19 and 20 differing from the

 

Gujarat High Court judgment in the case of Dhariyal Chemicals Vs. Union of India (UOI) and Others, and ultimately admitted the petition and

granted interim stay. In the light of the said decision, learned Counsel submits that the order passed merits to be set aside. He also placed before

me Letter F. No. 224/40/2006-CX. 6, dated 30-12-2006 of the Government of India, particularly to paragraph 3 as to the meaning assigned by

the Government to the term ""knowingly"" that the restriction in the availing of the monthly payment of excise duty and directing the petitioner to pay

the duty for each and every removal on daily basis may not be visited on an assessee as a matter of course and that the records and evidence

prima facie showed the sufficient cause indicating lack of mala fides. In the circumstances, having regard to the requirement of intention involved in

committing the alleged offence, there being no materials, the order has to be set aside.

11. On notice, the respondents have filed a counter affidavit, wherein, it is pointed out that the petitioner had admitted its lapses at the time of the

inspection conducted and that the offence had been committed for a prolonged period of six months from May, 2009 to October, 2009. The

failure to incorporate correct rate of duty was indicative of the conscious violation and the knowledge. Consequently, the order passed is justifiable

and in terms of the notification. It is further stated therein that the petitioner had committed this violation for the second time and on an earlier

occasion, accepting the mistake, he had settled the dispute through the intervention of the Settlement Commission during July, 2009. In the

circumstances, on the Cenvat credit claimed in the input services, they are rightly visited with the restrictions in terms of the notification dated 30-

12-2006. The respondents further pointed out that the reason attributed by the petitioner that the computer generated invoices resulted in the

mistake treating the input as a manufactured item, cannot be accepted as a mare inadvertence. He submitted that the offence having been

committed for a prolonged period of six months from May, 2009 to October, 2009, speaks about the conduct of the petitioner.

12. Heard the learned Counsel appearing for the petitioner and the learned Senior Central Government Standing Counsel appearing for the

respondents.

 

13. The petitioner had purchased CR sheets in coil from M/s. Hysco Steel India Ltd. and availed Cenvat credit of the duty paid on them. They

cleared the CR sheets as such to M/s. Technical Stampings Automotive Ltd., but had not paid the full amount of Cenvat credit availed by them on

such inputs cleared by them. The allegation of the respondents is that, they paid lesser duty of 8% and they should have reversed the Cenvat credit

availed on the CR sheets, which they failed to do so. Apart from this, instead of showing the tariff item as CR sheets in coil form, they had declared

it as non-existent tariff item in their clearance invoice. These, violations were found at the time of inspection. It is also relevant to note that the

petitioner, immediately after the inspection, had remitted the differential duty. The petitioner had taken a consistent stand that they had not

committed the mistake knowingly, but put the blame on the computer generated invoices keeping the current rate of duty and hence, had resulted

in the error in arriving at the proper rate of duty. The petitioner''s contention as regards the scope of the phrase ""knowingly"" has to be decided in

the context of how the term had been understood judicially.

14. The notification dated 30-12-2006 imposes certain restrictions on the beneficial provision on payment of duty in the event of an offence

committed knowingly - The notification reads as follows:

Notification: 32/2006-CE. (N.T.), dated 30-Dec-2006

Restrictions in certain types of cases for manufacturer, first stage and second stage dealer or exporter

In pursuance of Rule 12CC of the Central Excise Rules, 2002, and Rule 12AA of the Cenvat Credit Rules, 2004, the Central Government, hereby

declares that where a manufacturer, first stage or second stage dealer, or an exporter including a merchant exporter is prima facie found to be

knowingly involved in any of the following,-

(a) removal of goods without the cover of an invoice and without payment of duty;

(b) removal of goods without declaring the correct value for payment of duty, where a portion of sale price, in excess of invoice price, is received

by him or on his behalf but not accounted for in the books of account;

(c) taking of Cenvat Credit without the receipt of goods specified in the document based on which the said credit has been taken;

 

(d) taking of Cenvat Credit on invoices or other documents which a person has reasons to believe as not genuine;

(e) issue of excise duty invoice without delivery of goods specified in the said invoice;

(f) claiming of refund or rebate based on the excise duty paid invoice or other documents which a person has reason to believe as not genuine, an

officer authorized by the Board may order for withdrawal of facilities or impose certain restrictions as specified in para 2 of this Notification.

2. Facilities to be withdrawn and imposition of restrictions:

(1) Where a manufacturer is prima facie found to be knowingly involved in committing the offences as specified in para 1, the following restrictions

may be imposed on the facilities, namely:

(i) the facility of monthly payment of duties may be withdrawn and the assesses shall be required to pay excise duty for each consignment at the

time of removal of goods;

(ii) payment of duty by utilisation of Cenvat credit may be restricted and the assessee shell be required to pay excise duty without utilising the

CENVAT credit:

Provided that where a person is found to be knowingly involved in committing any one or more type of offences as specified in para 1 for the

second time or subsequently every removal of goods from his factory may be ordered to be under an invoice which shall be countersigned by the

Inspector of Central Excise or the Superintendent of Central Excise before the said goods are removed from the factory or warehouse.

Explanation 1. - It is clarified that a person against whom the order under sub-para (3) of para 4 has been passed may continue to take Cenvat

credit; however, he would not be able to utilize the credit for payment of duty during the period specified in the said order.

Explanation II. - For second time or subsequent, offence, the restriction specified in clauses (i) and (ii) may also be imposed.

(2) Where a first stage or second stage dealer is found to be knowingly involved in committing the type of offence specified at clauses (d) or (e) of

para 1, the registration granted under Rule 9 of the Central Excise Rules 2002 may be suspended for a specified period.

Explanation. - During the period of suspension, the said dealer shall not issue any Central Excise Invoice. However, he may continue his business

and issue sales invoices without showing excise duty in the invoice and no Cenvat credit shall be admissible to the recipient of goods under such

invoice.

(3) Where a merchant exporter is found to be knowingly involved in committing the type of offence specified at clause (f) of para 1, the self sealing

facility for export consignment may be withdrawn whereby each export consignment shall be examined and sealed by the jurisdictional Central

Excise Officer:

Provided that any other facility available to a manufacturer, first stage or second stage dealer or an exporter provided by a circular or an order

issued by the Board may also be ordered to be withdrawn for a specified period.

3. Monetary Limit. - The provisions of this notification shall be applicable only in a case where the duty or Cenvat Credit alleged to be involved in

the offences specified in para 1 is more than Rs. 10 lakhs.

4. Procedure. - (1) The Commissioner of Central Excise or Additional Director General of Central Excise Intelligence, as the case may be, after

examination of records and other evidence, and after satisfying himself that the person has knowingly committed the offence as specified in para 1,

may forward a proposal to the Chief Commissioner or Director General of Central Excise Intelligence, as the case may be, specifying the facilities

to be withdrawn and restriction to be imposed and the period of such withdrawal or restrictions, within 30 days of the detection of the case, as far

as possible.

(2) The Chief Commissioner of Central Excise or Director General of Central Excise Intelligence, as the case may be, shall examine the said

proposal and after satisfying himself that the records and evidence relied upon in the said proposal are sufficient to form a reasonable belief that a

person has knowingly committed the offences specified in para 1, may forward the proposal along with his recommendations to the Board.

However, the Chief Commissioner of Central Excise or Director General of Central Excise Intelligence, before forwarding his recommendations,

shall give an opportunity of being heard to the person against whom the proceedings have been initiated and shall take into account any representation made by such person before he forwards his recommendations to the Board.

(3) An officer authorized by the Board shall examine the recommendations received from the Chief Commissioner of Central Excise or Director

General of Central Excise Intelligence and issue an order specifying the type of facilities to be withdrawn or type of restrictions imposed, along with

the period for which said facilities will not be available or the period for which the restrictions shall be operative.

15. The said notification was amended under Notification No. 15/09 dated 10th June, 2009 by inserting Clause (g) in para 1. A reading of the

notification dated 30-12-2006 thus show that imposition of restriction on the facilities of payment of duty is more in the nature of a penal action to

be visited on a prima facie finding of ""knowingly involved in committing the offence"" as specified in para 1 of the notification.

16. Learned Senior Central Government Standing Counsel appearing for the Revenue, placed reliance on the decision reported in (2008) 13 SCC

369 (Union of India (UOI) v. Dharamendra Textile Processors) as well as (2009) 13 SCC 461 Commissioner of Central Excise, Pune v. SKF

India Ltd.) as regards the imposition of penalty. In the decision reported in (2009) 13 SCC 461; Commissioner of Central Excise, Pune v. SKF

India Ltd.), the Apex Court pointed out that there are two categories of cases, one by way of non-payment or short payment etc. of duty for

reasons other than deceit and the other in which the non-payment or short payment etc. of duty is intentional to evade payment of duty by adopting

deceitful means. The Apex Court held that penal provisions could be imposed where the non-payment is intentional. On the facts of the case, the

Supreme Court held that the short-payment of duty was totally unintended and without any element of deceit. The payment of differential duty thus

clearly came under Sub-section (2B) of Section 11A and attracted levy of interest u/s 11AB of the Act. In the circumstances, the Supreme Court

set aside the levy of penalty.

17. The Apex Court also distinguished the case with reference to the decision of the Supreme Court reported in (2008) 13 SCC 369 (Union of

India (UOI) v. Dharamandra Textile Processors). A reading of the said decision shows that the decision of the Supreme Court rested on the terms of the said Section attracting the penal provision. In the background of the facts in the present case, the decision carries relevance to the case of

the petitioner rather than supporting the cause of the Revenue.

18. It may be noted that even as regards the representation which had come up for consideration in the matter of levy of penalty under the General

Sales Tax Act and u/s 10(A) of the Central Sales Tax Act interpreting the words ''falsely represents'', in the decision reported in 148 STC 256

(Mad.) (FB) (State of Tamil Nadu v. Nu-Tread Tyres) a Full Bench of this Court held that the element of mens rea is the necessary component of

the offence. In the absence of mens rea, resort to penal provision would not be proper which means, different consequences are to be dealt with

differently and hence, mens rea as an essential ingredient, cannot be considered for the purpose of visiting the offender with penal consequences.

As far as the present case is concerned, it is no doubt, true that the petitioner had availed the facility of input tax credit with excise duty payable at

8% as against 12%. The consistent stand of the petitioner is that the computer generated invoices had resulted in a wrong claim, as such, no motive

could be attributed to the petitioner that it ""knowingly"" availed of the benefit, which the law did not permit. A reading of the notification shows that

the emphasis for visiting penal consequences by way of withdrawal of the facility was only where the violation is attributable to a knowledge on the

part of an assessee as to the wrong claim. The notification states that where the manufacturer is prima facie found to be knowingly involved in

committing the offence, then the assessed is visited with a restriction on the facilities enjoyed as regards payment of duty. The emphasis, hence, is a

prima facie finding as to the knowledge on violation, which means an intention to secure certain advantages under the Cenvat credit, which law

otherwise does not permit. Hence, on the facts of this case, unless and until the Revenue is able to show that the assessee knowingly made use of

the computer generated invoices with a view to gain unmerited advantage, it is difficult to accept, the plea of the respondents that motive could be

attributed to the petitioner to visit it with penal consequences.

19. It may be pointed out that even though the notification does not use the word ''wilfully'', but it merely requires a knowledge as to the violation, it

is clear that unless and until the respondents establishes that the petitioner acted knowingly with the mala fide intention of committing the offence,

the question of visiting the petitioner with the penal consequences as contained in the notification does not arise. In the absence of any

deliberateness in making use of the CENVAT credit, which otherwise is not available to the petitioner, it is difficult for this Court to accept the plea

of the respondents based on the decisions relied on by the respondents.

20. Short of repetition, it must be pointed out that when the notification, conditions the restrictions on a knowing violation, it stands to reason, that

a mere violation, per se, does not result in invoking of the restrictions in terms of the notification in a given case. Hence, on the plain wordings of

the notification, there being no material to show that the petitioner had committed the violation consciously, it is difficult to accept the plea of the

Revenue. With the notification emphasizing on a prima facie finding as to an assessee knowingly involved in any of the enumerated violations

qualifies an action under the notification, a mere violation thus does not expose an assessee otherwise to the restrictions contemplated in the

notification.

21. ""knowingly"" is often used as synonymous with ""intention"". The said attribute as to the knowledge will arise only when the person is conscious of

the consequences of his conduct. While dealing with penal consequences on violation of the provisions of the Act, particularly, with reference to

furnishing of forms to avail concessional levy, the Full Bench of this Court considered the meaning of ''false representation'' in the decision reported

in 148 STC 256 (Mad) (FB) (State of Tamil Nadu v. Nu-Tread Tyres). Referring to a catena of decisions on the issue of imposition of penalty,

this Court held that a penalty would not ordinarily be imposed unless the party obliged or either acted deliberately in defiance of law acting in

conscious disregard of his obligation. Even though the term that came up for consideration was ""false"" as provided u/s 10(b) of the Central Excise

Act to attract penal consequences u/s 10A of the Central Excise Act, yet drawing support from the said decision, I have no hesitation in accepting

the plea of the petitioner that on the plain terms of the notification, in the absence of any material to attribute any motive to the petitioner, the penal

restrictions spoken to consequent on the violations given under the notification will not be applicable to the petitioner''s case.

 

22. Learned Senior Central Government Standing Counsel pointed out that, on an earlier occasion, the Settlement Commission had also found as

regards the practice of the petitioner which did not speek well about the petitioner. In the circumstances, penal consequences must necessarily

follow. A perusal of the Settlement Commission''s order shows that there vas no wilful evasion of duty explicitly brought out in the show-cause

notice. A reading of the order now, under challenge makes no reference to the earlier notices to bring the petitioner''s case under the latter part of

the notification. Having regard to the scope of the Settlement Proceedings, I do not find any justification in the plea of the respondents that the

proceedings of the Settlement Commission will have relevance in testing the applicability of the notification. Hence, I have no hesitation in setting

aside the order impugned in the writ petition. Accordingly, the same stands set aside and the writ petition is allowed. No costs. Connected M.P.

Nos. 2 and 3 of 2010 are closed.