

(2024) 01 CHH CK 0075
In the Chhattisgarh High Court
Case No : TAXC No. 26 Of 2018

M/S Jagdamba Power & Alloys Limited APPELLANT
Vs
Commissioner Of Central Excise RESPONDENT

Date of Decision : 19-01-2024

Acts Referred:

CENVAT Credit Rules, 2004 — Rule 2(a), 6(4), 9, 9(6), 14
Central Excise Rules, 2002 — Rule 8
Central Excise Act, 1944 — Section 11A, 11A(1), 11A(4), 11AA, 11AB, 11AC, 37
Finance Act, 1994 — Section 73, 75, 94

Citation : (2024) 01 CHH CK 0075

Hon'ble Judges : Goutam Bhaduri, J;Deepak Kumar Tiwari, J

Bench : Division Bench

Advocate : Bhishma Ahluwalia, Maneesh Sharma

Final Decision : Allowed

Judgement

Goutam Bhaduri, J

1. The instant appeal has been preferred against the Final Order No.A/56558/2017-EX[DB] dated 15-9-2017 passed by the Customs, Excise & Service Tax Appellate Tribunal, New Delhi (henceforth 'the CESTAT') whereby the CENVAT (Central Value Added Tax) credit to the appellant was disallowed. The aforesaid appeal was preferred against the order-in-original No.Commissioner/RPR/CEX/10/2014 dated 12-3-2014 passed by the Commissioner, Customs, Central Excise & Service Tax, Raipur.

2. The facts, in brief, are that the appellant obtained Central Excise registration for manufacture of Pig Iron, Sponge Iron and Ferro Alloy, etc. A permission was also obtained to set up a captive power plant. The power generated was proposed for use in the manufacture of Pig Iron/Ferro Alloy, as per the project report. The power plant was installed and the power generated was supplied to the grid as the manufacturing plant for Ferro Alloys was not set up. The capital goods were brought into the factory and on such capital goods CENVAT credit

was availed by the appellant. The appellant's plant to commence production of Ferro Alloys got delayed and never got installed until the show-cause notice was issued.

3. The case of the department, in nut shell, was that since the capital goods on which the CENVAT credit was availed were used to manufacture only exempted goods (electricity), therefore, the CENVAT credit was inadmissible in terms of Rule 6(4) of the CENVAT Credit Rules, 2004. The order dated 15-9-2017, which is subject matter of this appeal, upholds the view taken by the Central Excise Department holding that until commencement of the proceedings, manufacturing facility for dutiable goods was not set up, therefore, the credit was inadmissible in terms of Rule 6(4) and is liable to be recovered under Rule 14 read with Section 11A of the Central Excise Act, 2004.

4. By order dated 1-8-2018 the present appeal was admitted by this Court on the following substantial question of law :-

i) Whether Rule 14 of the CENVAT Credit Rules, 2004 ('CCR') as in existence during the disputed period conferred jurisdiction and authority to issue the recovery proceedings for credit availed but not utilized?

ii) Whether the Tribunal is correct in law in disallowing credit overlooking the issue of limitation and thereby disallowing credit beyond the extended period of limitation and surpassing its jurisdiction"

iii) Whether the Tribunal is correct in law in disallowing credit without deciding the issue of limitation where suppression of facts or any malafide has not been established?

iv) Whether the Tribunal is correct in law in disallowing credit on co generation power plant which commenced production prior to the excisable capacity?"

5. (i) Learned counsel appearing for the appellant would submit that though the order impugned has touched upon the pleadings, but the important issue of limitation and jurisdiction have been given a go bye. He would further submit that the impugned order also fails to decide the issue that whether the department was empowered to issue show cause notice under Rule 14 and Section 11A for CENVAT credit availed but not utilized. He would submit that before initiation of the proceedings which touches upon the present litigation, the Central Excise Authority issued show cause notice dated 30-11-2010 demanding CENVAT credit of Rs. 1.27 crores on capital goods i.e. structures used in set up of power plant. Learned counsel would submit that while initiating proceeding through show cause notice dated 30-11-2010 the department has already alleged fraud and suppression and used extended period of limitation. Even otherwise it was well within the knowledge of the department that operation and avilment of credit through earlier proceedings were obtained by the appellant.

(ii) According to the learned counsel there has been no occasion wherein any information regarding avilment of CENVAT credit on capital goods for setting up

of power plant has been willfully suppressed with an intent to evade duty and there is no utilization of credit till date for payment of tax. Consequently, no short fall in payment or non-payment of tax comes to fore.

(iii) Learned counsel would submit that the earlier proceeding of show cause notice dated 30-11-2010 were initiated after examination of statutory returns and statutory records of the appellant. He would submit that the availment of CENVAT credit and no manufacture of dutiable goods have been declared every month by the appellant in its ER-1 return which stood filed online as well as physically. He would submit that despite admitted events on record, the department consciously avoided to issue any notice and fall back to the audit proceeding concluded on 12-3-2012, therefore, the fact of active fraud or suppression with an intent to evade tax does not exist. He would submit that based on such facts, deliberately the department proceeded to apply extended period of limitation of five years and issued the show cause notice on 7-8-2013 whereby the CENVAT credit availed for the period prior to July, 2008 was denied.

(iv) Learned counsel would submit that dutiable manufacturing capacity was delayed due to financial instability and market condition and could not be set up till 2017. Subsequently, the wire drawing unit was set up and power generated was used for wire drawing unit and excess was sold outside. According to him, Rule 6(4) restricts credit on capital goods only when capital goods exclusively for manufacture of taxable goods and where the taxable goods are used commonly for taxable goods and exempted goods, Rule 6(4) do not apply.

(v) Learned counsel would submit that when the show-cause notice was issued Rule 14 has been amended which postulates that where the CENVAT credit has been 'taken and utilised wrongly', the same shall be recoverable, therefore, when show cause notice was issued the department was not having jurisdiction. The jurisdiction of the excise department never exists as the statute itself did not give the power to issue such show-cause notice. He placed reliance upon the decision rendered by the High Court of Judicature for Andhra Pradesh at Hyderabad in the matter of Sridhar Paints Co. Pvt. Ltd. Vs. Commr. Of Cus. & C. Ex., Hyderabad-III 2009 (246) ELT 29 (AP). He would further submit that since the amendment was without any saving clause, as such, the proceeding initiated on the basis of previous rule which was existing in 2008 stands vitiated. He placed reliance upon the decision rendered by the Supreme Court in the matter of Kolhapur Canesugar Works Ltd. & Another Vs. Union of India & Others (2000) 2 SCC 536 : 2000 SCC OnLine SC 300.

(vi) Learned counsel would submit that Rule 9(6) of the CENVAT Credit Rules is only with respect to fulfillment of requirement and regarding production of document and maintaining records of documents and it cannot be said that the burden of proof with regard to this proceeding is on the appellant. He would submit that the department itself had issued a show cause notice in 2010 how the factum of fraud can be agitated in 2013. According to him, when the appellant acted in all bona fide as the initial registration was for dutiable excise

goods the same having been delayed it cannot be said that there is a suppression. He placed reliance upon the decision rendered by the Supreme Court in the matter of Commissioner, Central Excise and Customs v Reliance Industries (2023) SCC OnLine SC 767. He would submit that in view of the aforesaid submission the impugned order may be set aside and the present petition may be allowed.

6. (a) Learned counsel appearing for the respondent, per contra, would submit that Rule 9(6) of the CENVAT Credit Rules provided that the burden of proof regarding the admissibility of the CENVAT credit shall lie upon the manufacturer or provider of output service taking such credit, therefore, the burden of proof is on the appellant to prove that he is entitled to take CENVAT credit. Learned counsel would submit that when the enquiry about the wrong availment of credit was started, the Rule 14 as existed used the word 'taken or utilized', which was subsequently amended with the word 'and' as such the benefit of subsequent amendment cannot be given to the appellant. He would submit that the amendment cannot be applied retrospectively.

(b) With respect to limitation, learned counsel would submit that till 2012 the appellant did not disclose that they are selling electricity to outside and only in the year 2012 when enquiry was initiated they get aware about the said fact. He placed his reliance to the decision rendered by the Supreme Court in the matter of Maruti Suzuki Limited Versus Commissioner of Central Excise, Delhi III (2009) 9 SCC 193 to submit that the moment electricity sold outside instead of captive use that would be leviable. With respect to Section 11A of the Central Excise Act, learned counsel would refer to explanation 1(b)(i) and would submit that the date on which the excise duty was required to be paid would be a relevant date and the word 'excisable goods' has been defined under Section 2(d) of Schedule I & II, which shows that the electricity is a excisable goods.

(c) Learned counsel would also submit that date of filing of return is 10-8-2008. Consequently, the date of return filed in the said date for the excisable goods i.e. electricity would commence from the date of filing. He would submit that a letter was written by the appellant to the Bank that they have no intention to open the Pig Iron plant, but CENVAT credit was taken in 2008-09. Consequently, the same was illegal and the order impugned is well merited, which do not call for any interference of this Court.

7. We have heard learned counsel appearing for the parties and perused the documents.

8. CENVAT Credit Rules, 2004 was framed in exercise of the powers conferred by Section 37 of the Central Excise Act, 1944 and Section 94 of the Finance Act, 1994 and was in supersession of the CENVAT Credit Rules, 2002 and the Service Tax Credit Rules, 2002, except as respects things done or omitted to be done before such supersession, the Central Government notified the same on 10-9-2004. Rule 14 of the CENVAT Credit Rules postulates that where the

CENVAT credit has been taken and utilised wrongly or has been erroneously refunded, the same shall be recovered along with interest from the manufacturer or the provider of output service. It further postulates that the provisions of Sections 11A and 11AA of the Excise Act or Sections 73 and 75 of the Finance Act, 1994 shall be applicable till such recoveries.

9. Rule 14 of the CENVAT Credit Rules, 2004 (which is prevalent in 2013) is relevant and quoted below for ready reference :

"14. Recovery of CENVAT credit wrongly taken or erroneously refunded.- Where the CENVAT credit has been taken or utilized wrongly or has been erroneously refunded, the same along with interest shall be recovered from the manufacturer or the provider of the output service and the provisions of sections 11A and 11AB of the Excise Act or sections 73 and 75 of the Finance Act, shall apply mutatis mutandis for effecting such recoveries."

10. A bare perusal of the aforesaid provision, it is manifest that Rule 14 gives a power to the Revenue to recover but rider has been put as per Section 11A and 11AB of the Excise Act or Section 73 and 75 of the Finance Act. This necessarily lead us to refer Section 11A of the Excise Act, and relevant portion of the said provision is quoted below :

11A. Recovery of duties not levied or not paid or short-levied or short- paid or erroneously refunded.-- (1) Where any duty of excise has not been levied or paid or has been short- levied or short-paid or erroneously refunded, for any reason, other than the reason of fraud or collusion or any wilful misstatement 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,--

(a) the Central Excise Officer shall, within one year from the relevant date, serve notice on the person chargeable with the duty which has not been so levied or paid or which has been so short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice;

(b) the person chargeable with duty may, before service of notice under clause (a), pay on the basis of,--

(i) his own ascertainment of such duty;

or

(ii) the duty ascertained by the Central Excise Officer, the amount of duty along with interest payable thereon under Section 11AA.

(2) The person who has paid the duty under clause (b) of sub-section (1), shall inform the Central Excise Officer of such payment in writing, who, on receipt of such information, shall not serve any notice under clause (a) of that sub-section in respect of the duty so paid or any penalty leviable under the provisions of this Act or the rules made thereunder.

(3) Where the Central Excise Officer is of the opinion that the amount paid under clause (b) of sub-section (1) falls short of the amount actually payable, then, he shall proceed to issue the notice as provided for in clause (a) of that sub-section in respect of such amount which falls short of the amount actually payable in the manner specified under that sub-section and the period of one year shall be computed from the date of receipt of information under sub-section (2).

(4) Where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, by the reason of--

(a) fraud; or

(b) collusion; or

(c) any wilful misstatement; or

(d) suppression of facts; or

(e) contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty,

by any person chargeable with the duty, the Central Excise Officer shall, within five years from the relevant date, serve notice on such person requiring him to show cause why he should not pay the amount specified in the notice along with interest payable thereon under Section 11AA and a penalty equivalent to the duty specified in the notice.

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11. Reading of the aforesaid provision, it is evident that show cause notice for recovery should be issued within a period of limitation of one year, however, Section 11A(4) which provides exception to Section 11A(1) extends limitation from one year to five years from the relevant date where duty of excise has not been levied or paid or short levied or short paid or erroneously refunded by the reason of fraud or collusion or any wilful suppression of facts.

12. Since much emphasis has been placed about commencement of entire proceeding of recovery we went through the facts of this case. The appellant availed the credit between October, 2005 to July, 2008. Out of that an amount of Rs. 1,74,33,695/- was availed prior of 1-7-2008 and Rs. 4,59,51,412/- was availed in July, 2008. Thus, the total credit disputed amount is Rs. 5,13,70,707/-. Section 11A postulates the issue of show cause notice from the relevant date. Undisputedly, the return was filed in every month and the CENVAT credit, which was availed by the appellant, was also shown in the return, which is not in dispute. The 'relevant date' has been defined in explanation 1(b) (i), (ii) and (iii) of Section 11A of the Central Excise Act, which is quoted below :

(b) "relevant date" means,--

(i) in the case of excisable goods on which duty of excise has not been levied or paid or has been short-levied or short-paid, and no periodical return as required by the provisions of this Act has been filed, the last date on which such return is required to be filed under this Act and the rules made thereunder;

(ii) in the case of excisable goods on which duty of excise has not been levied or paid or has been short-levied or short-paid and the return has been filed on due date, the date on which such return has been filed;

(iii) in any other case, the date on which duty of excise is required to be paid under this Act or the rules made thereunder;

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13. Rule 8 of the Central Excise Rules, 2002 postulates that by 6th of every month the duty was payable meaning thereby when the credit was availed in July, 2008 the excise duty is to be paid for the return of July, 2008 is 6-8-2008. Therefore, the show cause notice would have been issued normally within one year, however, if the suppression of fact or fraud was found then the extended period of five years is available. Therefore, the question falls for consideration is as to whether while availing CENVAT Credit the appellant suppressed material facts.

14. Prior to issuance of show cause notice dated 7-8-2013, which is a subject matter of this appeal, earlier show cause notice was issued on 30-11-2010 by invoking the extended period of limitation. As per the respondent, the said show cause notice was issued on the basis of audit conducted, therefore, the appellant was not entitled to CENVAT credit.

15. Paras 2 & 2.1 of the show cause notice dated 30-11-2010 are relevant and the same are quoted below :

2) On verification of the Cenvat Records of Noticee, it was observed that they have irregularly taken Capital Goods cenvat credit of duties paid on various structural items, viz. MS Angles, Channels, M.S. Flats, Plates, M.S. Bar, CTD Bars, Joist, Beams, Coils, Sheets and Welding Electrodes, LPG Gas refilling and Oxygen Gas etc., which appears to have been used for erection and fabrication of various supporting structures during the period 2005-06 to 2009-10 (upto Oct/09). Noticee, upon query raised by the Range Office, vide their letter Ref: JPAL/C-EX/10- 11/001 dated 04.05.2010 (Annexure A), submitted the details of credit taken as capital goods on the aforesaid items which is summarized as under:-

SI

No.

Period

Items

Amount of credit taken (in Rs.)

Basic Ed Cess SHE Cess

1

2005-06

(from 10/05) To 2009-10

(upto 10/09)

Structural Steel Items viz. MS Angles, Channels, M.S. Flats, Plates, M.S. Bar, CTD Bars, Joist, Beams, Coils, Sheets, Barbed Wire, Welding Electrodes, LPG Gas refilling, Oxygen Gas etc.

1,24,69,378/-

2,49,204/-

Total

1,24,69,378/-

2,49,204/-

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2.1) Noticee failed to produce the details of receipt, disposal and consumption of the aforesaid structural steel items as required under Rule 9 of Cenvat Credit Rules, 2004. Noticee have also not mentioned/shown manufacture of any goods using the aforesaid steel items in their periodical returns filed with the department. As the onus is upon the manufacturer availing cenvat credit to fulfill the aforesaid condition, which they have failed to discharge, the aforesaid cenvat credit taken by them appears to be irregular and liable to be disallowed and recovered.

16. Perusal of the aforesaid contents of the show cause notice, no imagination can be drawn that the respondent was not aware of the fact that the CENVAT credit has been availed by the appellant.

17. The Supreme Court in the matter of P&B Pharmaceuticals (P) Ltd. v Collector of Central Excise (2003) 3 SCC 599 : 2003 SCC OnLine SC 253 : 2003 (153) ELT 14 (SC) has held thus at para 12 :

12) We have indicated above the facts which make it clear that the question whether M/s. Pharmachem Distributors was a related person has been the subject-matter of consideration of the Excise authorities at different stages, when the classification was filed, when the first show cause notice was issued in 1985 and also at the stage when the second and the third show cause notices were issued in 1988. At all these stages, the necessary material was before the

authorities. They had then taken the view M/s. Pharmachem Distributors was not a related person. If the authorities came to the conclusion subsequently that it was a related person, the same fact could not be treated as a suppression of fact on the part of the assessee so as to saddle with the liability of duty for the larger period by invoking proviso to Section 11-A of the Act. So far as the assessee is concerned, it has all along been contending that they were not related persons, so, it cannot be said to be guilty of not filling up the declaration in the prescribed proforma indicating related persons. The necessary facts had been brought to the notice of the authorities at different intervals from 1985 to 1988 and further they had dropped the proceedings accepting that M/s. Pharmachem Distributors was not a related person. It is, therefore, futile to contend that there has been suppression of fact in regard to M/s. Pharmachem Distributors being a related person. On that score, we are unable to uphold the invoking of the proviso to Section 11-A of the Act for making the demand for the extended period.

18. Further in the case of *Larsen & Toubro Ltd. v Commissioner of Central Excise, Pune II* (2007) 9 SCC 617 the Supreme Court reiterated the earlier decision of *P&B Pharmaceuticals (P) Ltd.* (supra) and held thus at paras 17 & 18 :

17. Yet again in *Nizam Sugar Factory v Collector of Central Excise*, the ratio rendered in *P & B Pharmaceuticals Ltd.* (supra) has been reiterated stating:

11. "Allegation of suppression of facts against the appellant cannot be sustained. When the first SCN was issued all the relevant facts were in the knowledge of the authorities. Later on, while issuing the second and third show cause notices the same/similar facts could not be taken as suppression of facts on the part of the assessee as these facts were already in the knowledge of the authorities. We agree with the view taken in the aforesaid judgments and respectfully following the same, hold that there was no suppression of facts on the part of the appellant/assessee."

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18. Furthermore, extension of the period of limitation entails both civil and criminal consequences and, therefore, must be specifically stated in the show cause notice, in absence whereof the Court would be entitled to raise an inference that the case was not one where the extended period of limitation could be invoked. [See *CCE v M/s. Punjab Laminates Pvt. Ltd.*]

19. It is well settled proposition that Section 11A(4) is an exception to the general rule and it should be invoked in exceptional circumstances not in a routine manner and specially when the assessee has disclosed everything which is required to disclose under the statute then it cannot be tainted with fraud of suppression of fact. The monthly return which was filed shows the indisputable fact that the appellant has disclosed about availment of CENVAT credit.

20. It is the case of the appellant that he availed CENVAT credit based upon the bona fide belief on the basis of multiple judgment wherein the intent to set up

both power plant of manufacture of electricity and plant for manufacture of taxable goods and even if power plant commences production before dutiable capacity the credit on power plant is available. This proposition has been held by the High Court of Karnataka at Bangalore in the case of Commr. of Central Excise, Bangalore v Kailash Auto Builders Ltd. 2012 (280) ELT 49 (Kar) : 2011 SCC OnLine Kar 4352 and the CESTAT, South Zonal Bench, Bangalore in the case of Sagar Sugars & Allied Products Ltd. v Commr. of C.Ex., Guntur 2010 (261) ELT 1102 (Tri.-Bang.).

21. In Kailash Auto Builders Ltd. (supra) the Karnataka High Court held thus at paras 6 & 7 :

6) It is not in dispute that the capital goods were purchased for the purpose of manufacturing the products in the assessee's factory. At the time of purchase, the excise duty was paid by the assessee on the said capital goods. After such purchase, the capital goods are used in the manufacture of both ex-empted goods and capital goods. In respect of exempted goods, as there was no liability to pay excise duty, the question of availing Cenvat credit in respect of exempted goods did not arise. However, in respect of excisable goods, the duty payable thereon was not paid and the Cenvat credit was utilized. In the entire material on record, there is nothing to indicate that the capital goods were purchased with any undertaking that the said goods will be used exclusively for the manufacture of exempted goods. In the absence of any such undertaking, when admittedly the capital goods are used for manufacture of both excisable goods and exempted goods, merely because in the beginning the capital goods were used in manufacture of exempted goods, the assessee cannot be denied the benefit of Cenvat credit when they started manufacturing excisable goods and clearing the said goods. There is no period of limitation prescribed for availing the Cenvat credit. Once the duty is paid on the capital goods, the assessee would get a right to avail the Cenvat credit if and when they have to pay duty on excisable goods.

7) Under these circumstances, the Tribunal was justified in holding that the assessee is entitled to avail the benefit of Cenvat credit while clearing the excisable goods. Therefore the demand by the Department was unjustified. Accordingly, we answer the question of law in favour of the assessee and against the revenue.

22. In Reliance Industries (supra), the Supreme Court while dealing with the issue of suppression of facts, observed that if the appellant was under a bona fide belief based upon certain judgment then in such case the said bona fide belief cannot be stated to be a suppression of fact and Court held thus at paras 8, 14 & 23:

8) On the issue of time bar, the CESTAT has held that during the relevant period the Appellant could have entertained a bonafide belief that it had correctly discharged its duty liability in view of the view taken by the Tribunal in the case of IFGL Refractories Ltd.¹ which came to be reversed by this Court only on

9.8.2005. It is relevant to note here that insofar as the decision on time bar is concerned the view of the two learned members who constituted the division bench of CESTAT was unanimous.

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14) In the case of Pushpam Pharmaceuticals Company Vs. Collector of Central Excise, Bombay², this Court, while dealing with a similar fact circumstance wherein the extended period of limitation under the abovementioned proviso had been invoked, held that since the expression "suppression of facts" is used in the company of terms such as fraud, collusion and willful misstatement, it cannot therefore refer to an act of mere omission, and must be interpreted as referring to a deliberate act of non-disclosure aimed at evading duty, that is to say, an element of intentional action must be present.

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23) We are in full agreement with the finding of the Tribunal that during the period in dispute it was holding a bonafide belief that it was correctly discharging its duty liability. The mere fact that the belief was ultimately found to be wrong by the judgment of this Court does not render such belief of the assessee a malafide belief particularly when such a belief was emanating from the view taken by a division bench of Tribunal. We note that the issue of valuation involved in this particular matter is indeed one where two plausible views could co-exist. In such cases of disputes of interpretation of legal provisions, it would be totally unjustified to invoke the extended period of limitation by considering the assessee's view to be lacking bonafides. In any scheme of self-assessment it becomes the responsibility of the assessee to determine his liability of duty correctly. This determination is required to be made on the basis of his own judgment and in a bonafide manner.

23. Further the record would show that the appellant entertained a bona fide view based on multiple judgments that where intent is to set up both power plant for manufacture of electricity and plant for manufacture of taxable goods, even if power plant is available.

24. In the instant case the appellant way back in the year 2005 filed the return wherein they have disclosed that they have availed the CENVAT credit. In the subsequent return of July, 2008 another availment of CENVAT credit was shown in the return, as the Supreme Court laid down that suppression of fact should not be interpreted as a mere act of omission, therefore, it cannot be held analogous to the fraud. There should have been deliberate act of non disclosure aimed at evading duty. Thus, the extended period under Section 11A(4) would not be available to the department and the show cause should have been issued under Section 11A(1) which permits limitation of only one year, as a result the department should have issued the show cause notice by 6-8-2009.

25. The respondent is also unable to impress us to show the provision or rule

which required the assessee to make additional disclosure of documents or facts. Therefore, in absence of mens rea which was required to apply the provisions of Section 11A(4) and Section 11AC for penalty, the intention to evade payment of duty cannot be interfered. The declaration to the department that facility was being set up for generation of electricity and Pig Iron/ Ferro Alloys was given by the appellant and the same declaration was given to the State VAT Department and Department of Industries, therefore, the department was aware of the fact that credit has been availed and no dutiable goods are manufactured through monthly statutory returns, which categorically stated the amount of credit availed and being carried and details of manufacture of goods. Perusal of the record would show that various returns have been filed, which are on record. Therefore, the relevant data was in the knowledge of the department as such suppression on the face of it cannot be alleged. To allege suppression, positive action having mens rea required to be established on the part of the appellant and even mere omission to give correct information cannot lead to conclusion of suppression unless it was deliberate to stop payment of duty. This proposition has been laid down in the matter of Continental Foundation Jt. Venture v Commissioner of Central Excise, Chandigarh-I 2007 (216) ELT 177 (SC).

Paras 9 to 12 of the said judgment are quoted below :

9) We are not really concerned with the other issues as according to us on the challenge to the extended period of limitation ground alone the appellants are bound to succeed. Section 11A of the Act postulates suppression and, therefore, involves in essence mens rea.

10) The expression 'suppression' has been used in the proviso to Section 11A of the Act accompanied by very strong words as 'fraud' or "collusion" and, therefore, has to be construed strictly. Mere omission to give correct information is not suppression of facts unless it was deliberate to stop the payment of duty. Suppression means failure to disclose full information with the intent to evade payment of duty. When the facts are known to both the parties, omission by one party to do what he might have done would not render it suppression. When the Revenue invokes the extended period of limitation under Section 11-A the burden is cast upon it to prove suppression of fact. An incorrect statement cannot be equated with a willful misstatement. The latter implies making of an incorrect statement with the knowledge that the statement was not correct.

11) Factual position goes to show the Revenue relied on the circular dated 23.5.1997 and dated 19.12.1997. The circular dated 6.1.1998 is the one on which appellant places reliance. Undisputedly, CEGAT in Continental Foundation Joint Venture case (supra) was held to be not correct in a subsequent larger Bench judgment. It is, therefore, clear that there was scope for entertaining doubt about the view to be taken. The Tribunal apparently has not considered these aspects correctly. Contrary to the factual position, the CEGAT has held that no plea was taken about there being no intention to evade payment of duty as the same was to be reimbursed by the buyer. In fact such a plea was clearly

taken. The factual scenario clearly goes to show that there was scope for entertaining doubt, and taking a particular stand which rules out application of Section 11A of the Act.

12) As far as fraud and collusion are concerned, it is evident that the intent to evade duty is built into these very words. So far as mis-statement or suppression of facts are concerned, they are clearly qualified by the word 'wilful', preceding the words "mis-statement or suppression of facts" which means with intent to evade duty. The next set of words 'contravention of any of the provisions of this Act or Rules' are again qualified by the immediately following words 'with intent to evade payment of duty.' Therefore, there cannot be suppression or misstatement of fact, which is not wilful and yet constitute a permissible ground for the purpose of the proviso to Section 11A. Misstatement of fact must be wilful.

26. Another aspect of consideration is whether the shows cause notice dated 7-8-2013 is barred by limitation of five years also. The submission of the respondent that 'relevant date' would be reckoned as per clause (i) (ii) of explanation of 1 of Section 11A does not appear to be applicable for the reason that those explanation deal with the cases where dispute is regarding excisable goods and duty thereon. According to us, the relevant provision to determine the relevant date is explanation 1(b)(iii) to Section 11A. The relevant date in cases not concerning duty on excisable goods shall be date on which duty of excise is required to be paid under the Act or Rules thereunder. In reference to the demand at hand, the entire credit was availed in July, 2008. Therefore, five years should be computed from July, 2008 and according to Rule 8 to the Central Excise Rules, 2002 for date of payment of duty is 6th of every month. Thus, five years commence from 6-8-2008 to 6-8-2013 and show cause notice issued on 7-8-2013, which is barred by limitation of one day. There is no dispute that monthly statutory return (ER-1) was filed every month by the appellant in the jurisdictional office. The case of the appellant was that when they intend to set up both power plant for manufacture of electricity and plant for dutiable goods, availed the CENVAT credit, which was shown in the return.

27. Now coming to the another part of the argument which deals to the jurisdiction of the Revenue authority when the show cause notice was issued. It is the case of the appellant that the revenue authority was not empowered to issue show-cause notice under the CENVAT Credit Rules, because under the CENVAT Credit Rules the show-cause can only be issued if the CENVAT Credit will be 'taken' and 'utilized'. As on date of issuance of show-cause notice the CENVAT Credit was not 'utilized' by the appellant, therefore, the revenue authority cannot issue show-cause notice.

28. This issue has arose due to the frequent amendments in the Rule 14 of the CENVAT Credit Rules 2004. Rule 14 of the Credit Rules provided for recovery of CENVAT credit taken or utilized wrongly or had been erroneously refunded along with interest from the manufacturer or the provider of output service. Erstwhile Rule 14 (prior to amendment in the year 17th March 2012) of the Credit Rules

has already been quoted in paragraph No.9 of this judgment.

29. The review of number of Judicial Precedent shows that the use of the word "OR" in erstwhile Rule 14 of the Credit Rules 2004 was always a subject matter of dispute with regards to its interpretation on account of chargeability of interest in case the assessee has taken but not utilized the CENVAT credit and if at all, the interest is leviable on the same or not. The said dispute however get finally settled by the Supreme Court in the case of Union of India v Ind-Swift Laboratories Ltd. [2011 (2) TMI 6 – Supreme Court] wherein it was held word "or" used in Rule 14 of the Credit Rules should not be interpreted as "and" and thus, interest would be payable even if the Cenvat credit is wrongly taken but the same is not utilized. The judgment of this Court in the case of Commissioner, Central Excise and Customs v M/s Vandana Vidyut Ltd. TAXC No.24 of 2014, is based on the principle laid down in Ind-Swift Laboratories Ltd. (supra) and erstwhile provision of the Cenvat Credit Rules.

30. However, there has been a change/amendment of provision. After the judgment of the Supreme Court in Ind-Swift Laboratories Ltd. (supra) the Government has incorporated new amendment in the Rule 14 of the credit rules 2004. The said amendment in Rule 14 of the Credit Rules was brought in the year 2012 vide Notification No. 18/2012-CE(NT) dated March 17, 2012 (Effective from April 1, 2012).

31. The relevant extract of Rule 14 of the Credit Rules (after amendment on 17th March 2012) effective since 1st April, 2012 is reproduced hereunder:

"RULE 14. Recovery of CENVAT credit wrongly taken or erroneously refunded.-- Where the CENVAT credit has been taken and utilized wrongly or has been erroneously refunded, the same along with interest shall be recovered from the manufacturer or the provider of the output service and the provisions of sections 11A and 11AA of the Excise Act or sections 73 and 75 of the Finance Act, shall apply mutatis mutandis for effecting such recoveries."

32. When the show cause notice dated 7-8-2013 was issued the above said amended provision was in force which does not empowers the Revenue Authorities to issue show cause notice when the Cenvat Credit has only been availed and not utilized.

33. The Supreme Court in the matter of Commissioner of Customs, Calcutta and Others v Indian Oil Corp. Ltd. and Another (2004) 3 SCC 488 held thus at para 12 :

12. The principles laid down by all these decisions are:

(1) Although a circular is not binding on a court or an assessee, it is not open to the Revenue to raise a contention that is contrary to a binding circular by the Board. When a circular remains in operation, the Revenue is bound by it and cannot be allowed to plead that it is not valid nor that it is contrary to the terms of the statute.

(2) Despite the decision of this Court, the Department cannot be permitted to take a stand contrary to the instructions issued by the Board.

(3) A show-cause notice and demand contrary to the existing circulars of the Board are ab initio bad.

(4) It is not open to the Revenue to advance an argument or file an appeal contrary to the circulars.

34. Thus, we are of the opinion that the show cause notice was without jurisdiction for the reason that when the show cause notice was issued the amended Rule 14 stipulated that the credit can erroneously availed can be recovered only if it has been taken and utilized.

35. Further, the question arises whether disallowing credit on co-generation power plant which commence production prior to the excisable credit is justified. As per the fact of the case, the original product of the appellant was to set up a captive power plant so as to generate power for use in the pig iron plant, however, due to some adverse market condition they dropped their plan.

36. Over the period in dispute various proposals were examined by the appellant including infusion of fresh capital. It is also evident thereafter, appellant also sought fresh permission for setting up another viable project for manufacture of excisable goods. Finally, appellant was able to set up the same and commence manufacture of dutiable goods using power generated from power plant in the year 2017.

37. Rule 2(a) of the CENVAT Credit Rules defines capital goods as specified goods used in the factory for manufacture of final product, in the instant case, the appellant always has intension to set up a plant with dutiable capacity in which they subsequently succeed in the year 2017.

38. The Supreme Court in *State of Haryana v Dalmia Dadri Cement Ltd.* 1987 (Supp) SCC 679 held thus in para 9 :

9) We are unable to accept the submission of Mr. Bana that, in order to get the exemption it must be shown that the goods in question namely, the cement supplied by the assessee in this case was actually used in the generation or distribution of electrical energy. It must be noted that the important words used in the relevant provisions are "goods for use by it in the generation or distribution of such energy" (emphasis supplied by us). On a plain reading of the relevant clause it is clear that the expression "for use" must mean "intended for use" If the intention of the legislature was to limit the exemption only to such goods sold as were actually used by the undertaking in the generation and distribution of electrical energy, the phraseology used in the exemption clause would have been different as, for example, "goods actually used" or "goods used."

39. Therefore, it cannot be said that revenue was right in disallowing credit on co-

generation power plant which commenced production prior to excisable credit as the appellant always has intention to use goods for manufacturing dutiable product.

40. Applying the well settled principles of law and for the reasons mentioned hereinabove, the appeal is allowed; the impugned Final Order No.A/56558/2017-EX[DB] dated 15-9-2017 passed by the Customs, Excise & Service Tax Appellate Tribunal, New Delhi is set aside; and the questions of law are answered in favour of the appellant.

41. There shall be no order as to cost(s).