

(2011) 09 MAD CK 0307

In the Madras High Court

Case No : W.A. No. 1846 of 2010 and M.P. No's. 1 and 2 of 2010

M/s. NCR Corporation India Private Limited

APPELLANT

Vs

Member (Central Excise) Central Board of Excise and
Customs North Block, Ministry of Finance Government of
India New Delhi, Chief Commissioner of Central Excise 26/1,
Mahatma Gandhi road Chennai-600 0 34, Commissioner of
Central Excise Puducherry Commissionerate No. 1, Goubert
Avenue Puducherry-605 001 and The Assistant Commissioner
of Central Excise 14, Municipal Street, Azeez Nagar
Puducherry-605 010

RESPONDENT

Date of Decision : 22-09-2011

Acts Referred:

Penal Code, 1860 (IPC) — Section 259, 26

Citation : (2011) 09 MAD CK 0307

Hon'ble Judges : K.K. Sasidharan, J;D. Murugesan, J

Bench : Division Bench

Advocate : V. Balasubramanian, for the Appellant; K. Ravi Ananthapadmanaban,
for the Respondent

Final Decision : Dismissed

Judgement

K.K. Sasidharan, J.—This writ appeal at the instance of the assessee challenges the order dated 2 September, 2010 in W.P.No.15917 of 2010 dismissing the writ petition impugning the order dated 19 July, 2010 on the file of Central Board of Excise and Customs, New Delhi.

Brief facts:

2. The appellant is engaged in the manufacture and sale of ATM Machines and its parts. The premises of the assessee was inspected by the officials of the Central Excise Department on 4 December, 2009. During the course of inspection it was found that credit was taken twice without receipt of goods mentioned in the respective invoices. The inspection further revealed that the assessee had availed

credit of duty on two occasions against a single document and this made the department to initiate proceedings against the assessee. The records were forwarded to the Central Board of Excise and Customs by the Chief Commissioner of Central Excise, Chennai.

3. The Central Board of Excise and Customs was of the view that the assessee committed serious misconduct in availing the credit twice in respect of a single transaction. Accordingly the facility of monthly payment of excise duty was suspended and the assessee was required to pay excise duty for each consignment at the time of removal of goods for the period between 22 July, 2010 and 15 October, 2010. The assessee was further directed to pay excise duty without utilising the CENVAT credit for that period.

4. The order dated 19 July, 2010 was challenged before the writ Court in W.P.No.15917 of 2010. The learned Single Judge considered the matter in extenso and opined that the impugned order was passed to deter the assessee from indulging in similar kind of evasion in future and as such, no interference is called for. Accordingly, the writ petition was dismissed. It is the said order which is impugned in this writ appeal.

Submissions:

5. The learned counsel for the appellant contended that the assessee has not utilised the wrongly entered credit and in fact, the balance of credit was many a times more than the credit pointed out by the revenue. According to the learned counsel, the revenue was bound to prove mens rea before taking away the benefits granted earlier and in the absence of any such finding regarding the involvement knowingly, the Central Board of Excise and Customs was not justified in passing the impugned order.

6. The learned Standing Counsel for the revenue justified the impugned order passed by the Central Board. According to the learned counsel, the course of conduct adopted by the assessee clearly shows that the attempt was to take credit twice and for the said purpose they have illegally splitted the amount into 415 entries and in that manner wrongly availed credit. Therefore, it was a deliberate case of availing the benefit twice and as such mens rea is writ large.

Analysis:

7. The substantial contention raised by the assessee pertains to absence of materials indicating mens rea within the meaning of Notification No. 32/2006 - C.E. (N.T.) dated 30 December, 2006. In short, it was the contention of the assessee that element of mens rea should be proved by the department before withdrawing the facilities and imposing restrictions.

8. The core issue is as to whether the revenue was having prima facie materials to arrive at a reasonable conclusion about the involvement of the assessee in a fraudulent transaction with mens rea.

9. The assessee justified the incident as a bona fide mistake.

10. The notification issued by the Central Government bearing No.32/2006 CE (N.T.) dated 30 December 2006 contains the nature of violations and the punishments to be imposed on manufacturers, dealers or exporters including merchant exporters, in case it is prima facie made out that they have knowingly involved in such violations. The manufacturers and importers were enjoying the benefits on the basis of the notification issued by the Government in accordance with the Central Excise Act and Rules made there under including the CENVAT credit rules. The restrictions were imposed with a view to discourage the manufacturers and exporters from misusing the facilities.

11. The notification contains as many as six instances, the presence of which would give jurisdiction to the department to take action to withdraw the facilities and to impose restrictions. Clause (c) of the notification contains a clear indication that taking CENVAT Credit without the receipt of goods specified in the document based on which the said credit has been taken, would amount to a malpractice. The notification also contains the restrictions to be imposed in the event of making out a case of duty evasion or other kinds of statutory violations.

12. The manufacturers and exporters were expected to follow the provisions of the beneficial notification in its letter and spirit. In case on the basis of materials a prima facie case is made out about the involvement of a particular manufacturer or exporter, in a fraudulent transaction it would give a cause of action to the Revenue for taking deterrent measures. The Authorities who were instrumental in giving concessions were equally entitled to withdraw the same or to take action in case of proved violation. The notification dated 30 December 2006 indicates that in order to take action for violation, the authority has to be satisfied prima facie. The materials collected by the prescribed authority must prima facie prove involvement of the assessee and their knowledge, in the fraudulent action.

The Authorities:

13. The Supreme Court in Joti Parshad Vs. State of Haryana, , while interpreting the term "knowledge" and "Reason to believe" within the meaning of Section 259 and 26 of Indian Penal Code

observed :

Knowledge is an awareness on the part of the person concerned indicating his state of mind. Reason to believe is another facet of the state of mind. Reason to believe is not the same thing as suspicion or doubt and mere seeing also cannot be equated to believing. Reason to believe is a higher level of state of mind. Likewise knowledge will be slightly on a higher plane than reason to believe. A person can be supposed to know where there is a direct appeal to his senses and a person is presumed to have a reason to believe if he has sufficient cause to believe the same. Section 26 IPC explains the meaning of the words reason to

believe thus:

26. Reason to believe. A person is said to have reason to believe a thing, if he has sufficient cause to believe that thing but not otherwise.?

In substance what it means is that a person must have reason to believe if the circumstances are such that a reasonable man would, by probable reasoning, conclude or infer regarding the nature of the thing concerned. Such circumstances need not necessarily be capable of absolute conviction or inference; but it is sufficient if the circumstances are such creating a cause to believe by chain of probable reasoning leading to the conclusion or inference about the nature of the thing. These two requirements i.e. knowledge and reason to believe have to be deduced from various circumstances in the case.

14. The Supreme Court in *Basdev Vs. The State of Pepsu*, , observed that in many cases intention and knowledge merge into each other and in fact, knowledge is an awareness of the consequences of the act. The Supreme Court said:

Motive is something which prompts a man to form an intention and knowledge is an awareness of the consequences of the act. In many cases intention and knowledge merge into each other and mean the same thing more or less and intention can be presumed from knowledge. The demarcating line between knowledge and intention is no doubt thin but it is not difficult to perceive that they connote different things.

15. The Supreme Court in *U.P. Power Corporation Ltd. Vs. National Thermal Power Corporation Ltd. and Others*, , indicated that the power to regulate would include the power to prescribe and enforce all such proper and reasonable rules and regulations as may be deemed necessary to conduct the business in a proper and orderly manner. The Supreme Court said:

48. The power to regulate may include the power to grant or refuse to grant the licence or to require taking out a licence and may also include the power to tax or exempt from taxation. It implies a power to prescribe and enforce all such proper and reasonable rules and regulations as may be deemed necessary to conduct the business in a proper and orderly manner. It also includes the authority to prescribe the reasonable rules, regulations or conditions subject to which the business may be permitted or may be conducted.

16. The proceedings taken by the authorities, invoking the notification dated 30 December 2006, was in the nature of a deterrent proceeding taken with the sole aim of making the assessee not to indulge in such violations in future. The notification itself contains the procedure to be adopted by the Commissioner of Central Excise. The Chief Commissioner, Central Excise, was expected to satisfy himself from the records and evidence and in case he has arrived at a *prima facie* conclusion that there are sufficient materials to form a reasonable belief that a person has knowingly committed the offence as specified in paragraph 1 of

the notification, he has to forward the recommendation to the Board. The person against whom action is proposed would be given an opportunity to submit his version. Therefore, the notification contains an in-built procedure to collect materials and to take action, with an opportunity of hearing to the concerned.

17. The evidence collected by the Department of Central Excise were sufficient to take action against the appellant. The appellant sought to explain the incident as a bona fide mistake on the part of their employees. The appellant in their explanation put forward a case that employees responsible for the mistake were suspended from service.

18. The explanation of the assessee should be considered in the light of the modus operandi adopted by them to avail credit twice. Deliberate and intentional act of taking the credit twice on the very same invoice was demonstrated by the Department in their counter affidavit filed in the present appeal.

19. The appellant had taken the entire credit of Rs.97,48,000/-in a single entry bearing No.1889 dated 29 November 2008. However, the appellant once again had taken the entire credit of Rs.97,48,000/-on 22 December 2008 splitting the amount into 415 entries bearing Nos.3229 to 3643. Therefore, the credit in respect of invoice PEOU000852 was taken subsequently by resorting to the act of splitting the CENVAT credit. The authorities have mentioned certain other circumstances and the statement given by the Manager [Commercial] of the appellant Company to arrive at a prima facie conclusion regarding the misuse of the concession notification and for the purpose of taking deterrent action under notification dated 30 December 2006. The details of the acts made mentioned in the impugned order and counter affidavit filed by the Department clearly gives an indication that the appellant was knowingly involved in the act of taking credit twice.

20. The learned counsel for the appellant contended that mens rea is necessary for invoking the notification dated 30 December 2006. The very fact that the appellant has taken action to split the entire CENVAT credit into 415 entries in spite of taking the entire credit on a single entry on 29 November 2008 shows nothing but mens rea. Nothing more is necessary to prove the element of mens rea. The defence that the appellant was having a credit balance of Rs.20 crores at any given point of time also would not come to their rescue in view of their deliberate attempt to split the single entry into 415 entries and taking the credit once again.

Conclusion:

21. The materials produced by the revenue clearly show that the assessee was instrumental in taking the credit for the second time with full knowledge. Therefore, it cannot be said that there were no materials before the revenue to take deterrent action against the assessee. The issue raised by the appellant was rightly decided against them. We do not find any reason to take a different view in the matter.

22. In the result, the writ appeal is dismissed. Consequently, the connected Mps are closed. No costs.