

(2010) 09 MAD CK 0110

In the Madras High Court

Case No : Writ Petition No. 15917 of 2010 and M.P. No's. 1 and 2 of 2010

NCR Corporation Indian Private Limited

APPELLANT

Vs

Member (Central Excise), Central Board of Excise and
Customs, Chief Commissioner of Central Excise,
Commissioner of Central Excise and The Assistant
Commissioner of Central Excise, Puducherry I Division

RESPONDENT

Date of Decision : 02-09-2010

Acts Referred:

Central Excise Rules, 2002 — Rule 12CC
Central Excises and Salt Act, 1944 — Section 11A, 11AA, 11AB, 11AC
CENVAT (Credit) Rules, 2004 — Rule 12AA

Citation : (2010) 259 ELT 663

Hon'ble Judges : N. Paul Vasanthakumar, J

Bench : Single Bench

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

Final Decision : Dismissed

Judgement

N. Paul Vasanthakumar, J.—In this writ petition, petitioner seeks to quash the order dated 19.7.2010 passed by the first respondent

suspending CENVAT credit facility for a period from 22.7.2010 to 15.10.2010 to the petitioner Company.

2. The brief facts necessary for disposal of the writ petition are as follows:

(a) The petitioner Company is engaged in the manufacture and sale of ATM machines and their parts, which is falling under Chapter 84 of Central

Excise Tariff and it is having Central Excise Registration. According to the petitioner Company it is discharging its Excise Duty liability by paying

about a sum of Rs. 36 crores per annum.

(b) It is claimed by the petitioner that during the period from October, 2008 to December, 2008, due to the change in staff attending Central

Excise CENVAT credit work, there was duplication in the entry of credit to the tune of Rs. 176.27 lakhs, which is also reflected in the monthly ER

1 returns. On 4.12.2009 the departmental officials discovered the above mistake and recorded statements from the deponent of the affidavit on

5.12.2009 and on 7.12.2009.

(c) According to the petitioner's affidavit, it was stated in the said statement dated 5.12.2009 that the mistake was made due to inadvertence and

not intentional and the petitioner Multi -National Company is having an annual turnover of Rs. 700 crores and is having a credit balance of Rs. 20

crores at any given time.

The said mistake was committed by the lower level officials and the wrong credit taken remained unutilized in the books of accounts. Another

statement was recorded on 7.12.2009 from one K. Dassarithane, who is an Assistant Commercial Officer of the petitioner Company, who also

said to have stated that the Company is receiving 200 to 250 invoices/bills of entry every day and the five volumes of input invoices resulted in

duplication of credit.

(d) According to the petitioner Company, the mistake having been noticed, the Company paid the entire amount of Rs. 1, 76, 26, 524/-, by way

of cash of Rs. 8.50 lakhs on 9.12.2009 ; Rs. 1.00 crore on 10.12.2009 ; and Rs. 25 lakhs on 11.12.2009 ; and 4 Rs. 42,76,524/- on

10.12.2009 through Sl. No. 221 of CENVAT Account.

(e) A show cause notice No. 48 of 2009 was issued on 30.12.2009 proposing to appropriate the amount paid, besides penalty provisions, which

was replied by the petitioner on 7.6.2010 and the matter is yet to be adjudicated. According to the petitioner Company, it was under the

impression that it has to face adjudication, however, a personal hearing intimation dated 1.1.2010 was received from the second respondent's

office proposing to impose deterrent measures as contemplated under Notification No. 32/2006 - CE(NT). The petitioner submitted detailed

written submissions besides attending personal hearing before the second respondent.

(f) The petitioner received the impugned order dated 19.7.2010 passed by the

first respondent, communicated through the third respondent stating that the petitioner is restrained from availing the facility of monthly payment of excise duty and forcing the petitioner to pay duty on daily basis between 22.7.2010 and 15.10.2010 and utilizing the CENVAT credit to permit accumulation of the said credit for future clearance after 15.10.2010, apart from forcing the petitioner to intimate the jurisdictional Superintendent of Central Excise within 24 hours from the receipt of the principal inputs and await verification from him in the next 48 hours.

(g) The said order is challenged in this writ petition by contending that there was no mens rea on the part of the petitioner Company and presence of mens rea is a sine qua non as per Notification No. 32/2006. It is also contended in the affidavit that the said notification was issued for imposing deterrent punishment action only in case of manufacture, if prima facie found to be knowingly involved in committing the offence, and the petitioner having committed the mistake by inadvertence the impugned order ought not to have been passed. According to the petitioner the impugned order is premature, particularly when adjudication is pending pursuant to the show cause notice issued on 30.12.2009 before the third respondent and in any event there is no revenue loss to the Government since the petitioner has not utilized the credit accounted in the books. The proceedings issued under Notification No. 32/2006 is to be set aside as it is in violation of the principles of natural justice.

3. The respondents have filed counter affidavit contending as follows:

(i) Rule 12 AA of CENVAT Credit Rules 2004 and Rule 12CC of the Central Excise Rules, 2002 were issued due to past experience of working and empowering the Central Government with the power to impose restrictions with certain types of cases having regard to the extent of misuse, nature and type of offences and such other factors on public interest.

(ii) In the petitioner's case, on specific intelligence, the Head Quarters Preventive Unit of Puducherry Central Excise Commissionerate, on verification identified that the petitioner had availed credit twice over the duty specified in the impugned document received from another Unit of the petitioner Company in the same premises, registered as 100% export oriented Unit. An amount of Rs. 1.76 crores has been availed as credit twice under 60 input invoices having a bearing upon 988 credit entries in their

books of accounts. Petitioner admitted and paid the duty to cover its liability. Statements were also recorded from Mohamed Kasim Sheriff, Manager (Commercial) and K. Dassarithane, Assistant Commercial Officer of the petitioner Company.

(iii) The Commissioner of Central Excise, Puducherry on prima facie satisfaction forwarded a proposal to the Chief Commissioner of Central

Excise, Chennai, recommending action in terms of Notification No. 32 of 2006. The petitioner Company attended personal hearing through its

consultant on 5.1.2010 and filed written submissions. The Chief Commissioner, considering the proposal sent by the Commissioner of Central

Excise, Puducherry and the submissions made by the petitioner including written submissions and after affording opportunity of hearing and

considering the evidence available on record, came to a reasonable belief that the petitioner has knowingly taken CENVAT credit twice and sent a

proposal without receipt of goods by sending proposal to the first respondent for passing appropriate orders. The first respondent after careful

examination observed that a case of prima facie availment of CENVAT Credit twice under 60 input invoices having a bearing upon 998 credit

entries and for such offence deterrent measures are mandatory in the Notification No. 32/2006 and passed the impugned order.

(iv) In the counter affidavit it is also stated that the Commercial Department had conducted audit for relevant period and still the accounts remained

unreconciled and there is no evidence to establish that the entries were made inadvertently. The wrong availment of CENVAT credit twice on the

same input invoices was admitted by the petitioner. The average rate of credit availed for the months of October, 2008 to December, 2008 also

verified and the rate of credit availed in each month ranged between Rs. 2.00 to Rs. 3.50 crores only. But for the months of November and

December, 2008 alone an alarming rate of Rs. 7.00 crores and Rs. 6.50 crores were taken as CENVAT credit respectively, which is double the

average level availed in any given month over the period of three years. The entire excise credit resulted in double credit transaction enumerated

from their sister concern, which is also situated in the same premises. Therefore the petitioner's contention that double entry was made by

oversight cannot be sustained and the credit availed was with intention and

therefore the impugned order is sustainable in terms of Notification No. 32/2006.

4. A reply affidavit is filed by the petitioner Company denying the averments made by the department in the counter affidavit.

5. Heard the learned Counsel for the petitioner Company and the learned Counsel for the respondents.

6. The learned Counsel for the petitioner relied upon the judgment of this Court reported in Global Stamping and Welding Automotive P. Ltd. Vs.

C.B.E. and C., and contended that unless the intention to defraud the department is made out, the impugned order like the one cannot be passed.

7. The learned Counsel for the respondents on the other hand relied on an unreported decision of the very same learned Judge made in W.P. No.

4764 of 2010 dated 16.4.2010 (M/s. Reil Electricals India Limited v. C.B.E.&C. and Ors.) and contended that if there is prima facie material

available, such restriction order can be passed pending adjudication.

8. I have considered the rival submissions of the learned Counsel for the petitioner Company as well as learned Counsel for the respondents.

9. From the facts narrated above it is evident that there is discovery of mistake by the departmental officials. Even though according to the

petitioner it has happened inadvertently, there is an admission of fact by paying the duty subsequently by the petitioner to the tune of Rs.

1,76,26,524/-. The learned Counsel for the respondents is justified in contending that after investigation and recording of statement, the said

evasion of duty was found and the double credit transaction was utilized from their sister concern, which is situated in the same premises.

Notification No. 32/2006 dated 30.12.2006 was issued to prevent such violations. In the said notification it is stated that,

(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 assessee shall be required to pay excise duty for each consignment at the

time of removal of goods ;

(ii) payment of duty by utilization of CENVAT credit may be restricted and the assessee shall be required to pay excise duty without utilizing 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 I

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.

Procedures to be followed while deciding the matter under the circular reads as follows:

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.

10. The Department after issuing show cause notice dated 30.12.2009 issued notice dated 1.1.2010 for personal hearing on 5.1.2010 to proceed

against the petitioner for deterrent action under Notification No. 32/2006 and the petitioner submitted written objection on 5.1.2010 before the

second respondent and contended that the wrong credit was taken due to mistake committed by the lower level official and prayed for lenient

view. The said stand was reiterated during personal hearing and pleaded that there was no willful default. The first respondent considered the pleas

raised and stated in the impugned order that the action proposed under Notification No. 32/2006 is not recovery, penal or compensatory, and it is

only a deterrent measure. The assessee has clearly admitted taking credit twice and the authority recorded reasons for reaching prima facie finding

that the assessee knowingly involved in committing the offences specified in the notification. It is also stated that the impugned restrictions are

necessary to bring the assessee on the correct rails, so that there is compulsion on statutory compliance, at best in future, to prevent duty evasion.

Recording of reasons by the first respondent is based on facts after following the procedures mentioned in the notification.

11. In the unreported judgment of this Court in W.P. No. 4764 of 2010 dated 16.4.2010 (cited supra), in paragraphs 7 and 8 it is held as

follows:

7. I agree with the submissions of the learned Standing Counsel appearing for the respondents. Notification No. 32/06 imposes restrictions on the

facilities as regards payment of duty when the violations as regards removal of goods without payment of duty is done consciously. The

Notification imposes restrictions on the payment of duty as well as on the availing of CENVAT credit on the stated circumstances of violation.

Such restrictions are imposed keeping in mind the need to protect the interest of the Revenue as well as to have a check on the breach of law

consciously committed by an assessee, leading to evasion of duty ; that restrictions imposed as to the payment of duty and availing of CENVAT

credit would bring an erring assessee to comply with the provisions in accordance with law. The restrictions imposed are only for a restricted

period of time. Given the nature of restrictions thus imposed, that too on a satisfaction of the conduct of the assessee knowingly committed the

violation, rightly, in the case on hand, the respondents had passed the impugned order. It must be noted that such restrictions are necessary to

bring the erring assessee on the correct rails, so that there is a compulsion on statutory compliance atleast in the future. It is further seen that to

avoid any arbitrary exercise of authority in imposing restrictions, the Board had laid down broad outline and the circumstances which warrant

imposition of restriction. A reading of various circumstances narrated warranting imposition of restrictions clearly shows that these measures are

aimed at preventing duty evasion arising on account of removal of goods without payment of duty and availing of CENVAT credit which otherwise

is not justifiable.

8. Considering the fact that the petitioner herein availed CENVAT credit and there was removal of goods without payment of duty, on the

admitted lapse, rightly, the restrictions were imposed. The mere fact of payment of duty with interest does not absolve or cleanse the petitioner of

the violations committed by the petitioner. Hence, on the substantiated fact, that the petitioner had knowingly committed this violation as spoken to

in paragraph 1 of the Notification, imposing the restrictions on the payment of duty and availing of CENVAT credit and that too for a limited

period by the respondents cannot be viewed as an arbitrary exercise. Given the fact that the evidence on record shows that the petitioner had

illegally availed the CENVAT credit facility and the statement of the Chief Executive Officer recorded on 6.3.2009 clearly establishing the fact that

during December, 2008, there was no sufficient balance in CENVAT credit for payment of duty on the goods removed ; that they had paid the

duty only subsequently with interest, that too when confronted by a scrutiny, thus clearly show a conscious attempt to gain an advantage which

otherwise is not permissible under law. Hence, in the context of the evidence of B. Gnanasekaran and subsequent statement of CEO, Bajpai, it is

difficult to accept the statement of Bajpai that when the petitioner had made the differential duty with interest, they should be exonerated from the

consequences of violation. In the circumstances, I have no hesitation in rejecting the plea of the petitioner, thereby dismissing the writ petition.

12. The decision cited by the learned Counsel for the petitioner reported in 2009 (234) ELT 578 (Bom)(Hiran Aluminium Ltd. v. Union of India)

is only against an interim order and the same cannot be treated as laying down the law.

13. The Supreme Court in the decision reported in 2009 (13) SCC 448 (Union of India v. Rajasthan Spinning and Weaving Mills) considered the

issue as to whether payment made by the assessee before show cause notice alter the liability to pay penalty. The said case arose with reference to

Section 11A (Recovery of duties) ; Section 11AA (Interest for the period from three months after determination of duty payable till the date of

payment of duty); Section 11AB (interest for the period from the first day of the month succeeding the month in which duty was payable till the

payment of duty) ; and Section 11AC (penalty for short levy or non - levy of duty) of the Central Excise Act, 1944. The Supreme Court held that

penalty as punishment for an act of deliberate deception by the assessee, with an intent to evade duty, will inevitably lead to imposition of penalty.

The decision of the Supreme Court reported in The Chairman, SEBI Vs. Shriram Mutual Fund and Another, explains how to decide civil liability

and criminal liability in tax matters. In para 34, it is held thus,

34. The Tribunal has erroneously relied on the judgment in Hindustan Steel Ltd. v. State of Orissawhich pertained to criminal/quasi-criminal

proceedings. That Section 25 of the Orissa Sales Tax Act which was in question in the said case imposed a punishment of imprisonment up to six

months and fine for the offences under the Act. The said case has no application in the present case which relates to imposition of civil liabilities

under the SEBI Act and the Regulations and is not a criminal/quasi-criminal proceeding.

Thus, the learned Counsel for the petitioner cannot contend that unless the adjudication order is passed and wilful evasion is established, the

impugned order passed as per notification No. 32/2006 cannot be sustained. The impugned order is passed to deter the assessee from indulging in

such kind of evasion in future for the mistake committed, which was found by the Department and not by the assessee itself. If the mistake was

found by the assessee without the intervention of the Department and paid the same, one can understand the logic in the contention that the mistake

has crept in inadvertently.

14. Applying the principles laid down in the above cited decisions to the facts of this case and having regard to the fact that admittedly there is

evasion of duty, and the fact that the first limited period i.e., from 22.7.2010 to 15.10.2010, no exception could be taken to quash the impugned

order dated 19.7.2010.

15. In the light of the above findings, there is no merit in the writ petition and consequently the writ petition is dismissed. No costs. Connected

miscellaneous petitions are also dismissed.