CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH - COURT NO.I

Excise Appeal No.70728 of 2018

(Arising out of Order-in-Appeal No.39-GBN-EXST-APP-17-18 dated 27/04/2018 passed by Commissioner (Appeals) Central Tax & GST, Greater Noida)

M/s Precision Moulds & Dies, ...Appellant
(8/4C, Site IV, Sahibabad, Ghaziabad-201010)

VERSUS

Commissioner of Central GST, Ghaziabad ....Respondent

(Asstt. Comm. Central Excise, Div.III, Ghaziabad)

APPEARANCE:

Shri Rajesh Chhibber, Advocate for the Appellant
Shri Manish Raj, Authorised Representative for the Respondent

CORAM: HON'BLE MR. P.K. CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO.70560/2024

DATE OF HEARING : 07 May, 2024
DATE OF PRONOUNCEMENT : 04 September, 2024

SANJIV SRIVASTAVA:

This appeal is directed against Order-in-Appeal No.39-GBN-EXST-APP-17-18 dated 27/04/2018 passed by Commissioner (Appeals) Central Tax & GST, Greater Noida. By the impugned order Commissioner (Appeals), uphold the Order-in-Original dated 12.05.2017, wherein following has been held:-

ORDER

(I) "I confirm the demand of Central Excise duty amounting to Rs.27,88,702/- (Cenvat-Rs.27,07,477/- + Ed. Cess Rs.54150/- + H.E.D Cess Rs.27075/-) (Twenty Seven Lakhs Eighty Eight

Thousand Seven Hundred Two) under section 11A of the Central Excise Act, 1944.

(ii) I also confirm the demand of interest from them on the above amount under Section 11AA of the Central Excise Act, 1944, and

iii) I impose a penalty of Rs.2,78,870/- (Two Lakhs Seventy Eight Thousand Eight Hundred Seventy only) upon the party under Section 11AC 1(a) of Central Excise Act, 1944. Further, benefit of reduced penalty is applicable under Section 11AC 1(b) of Central Excise Act, 1944."

2.1 Appellant is engaged in manufacture of plastic moulds and dies falling under Tariff item No.84798700, 84807100 and 39239090 of the First schedule to Central Excise Tariff Act, 1985. They are also availing the benefit of Cenvat credit of duty paid on inputs used in the manufacture of their finished goods.

2.2 During the course of audit it was observed that some of the manufactured moulds with PP granules were transferred to other factory namely M/s Amrita Mouldings Pvt. Ltd. without payment of duty for manufacture of plastic items on job work basis and after completion of job work moulds were returned to them. These moulds were not charged to duty and consumed over a period of time. The fact about clearance of moulds in this manner was not reflected in the daily stock register and ER-1 returns. Thus, appellant was suppressing the fact about the manufacture and clearance of the moulds without payment of duty.

2.3 Show cause notice dated 30.09.2014 was issued to the appellant and the same was adjudicated as per the Order-in-Original dated 29.01.2015.

2.4 Despite the above, appellant continued with the practice of clearing the moulds without payment of duty. Investigations revealed that by doing so appellant short paid duty as indicated in table bellow:-

Document No. & Date	Qty. (Nos.)	Value	Amount of Central Excise duty			
			CENVAT	Ed. Cess	S&HE Cess	Total
C.G-1 dt. 02.12.2014	12	13997820	1399782	27996	13998	1441776

C.G-2 dt. 01.01.2015	09	12394174	1239417	24788	12394	1276599
C.G-3 dt. 24.01.2015	01	682783	68278	1366	683	70327
Total		27074777	2707477	54150	27075	2788702

2.5 Show cause notice dated 01.05.2015 was issued to the appellant, asking them to show cause as to why:-

"(i) Central Excise duty amounting to Rs. 27,88,702/- (Cenvat-Rs.27,07,477/- + Ed.Cess Rs. 54150/- + H.ED Cess Rs. 27075/-) should not be demanded and recovered from them under section 11A of the Central Excise Act, 1944 by invoking extended period,

(ii) Interest should not be charged and recovered from them on the above mentioned amount under section 11AA of the Central Excise Act, 1944,

(iii) Penalty should not be imposed upon them under rule 25 of the Central Excise Rules, 2002.

Earlier this Show cause notice was answerable to the Additional Commissioner, Central Excise, Ghaziabad but in view of Circular No. 1049/37/2016-CX of Central Board of Excise & Customs a corrigendum was issued vide C.No. V(15)Adj/C.Ex/Precision/20/15-16/5153-5155 dated 07.10.2016 It was made answerable to the Assistant Commissioner, Central Excise, Division-III, Ghaziabad."

2.6 This show cause notice was adjudicated as per the Order-in-Original referred in para-1 above. Aggrieved appellant have filed appeal before Commissioner (Appeals), who vide the impugned order dismissed the appeal. Aggrieved appellant has filed this appeal.

3.1 We have heard Shri Rajesh Chhibber learned Counsel appearing for the appellant and Shri Manish Raj learned Authorised Representative appearing for the revenue.

3.2 Arguing for the appellant learned Counsel submits that-

- The moulds were capital goods and therefore in terms of Cenvat Credit Rules, the same can be sent for job-work.

- Reliance is placed on the decision of this Tribunal in the case of M/s Zenith Machine Tools Pvt. Ltd. 2010 (255) ELT 83 (Tri.-Bang.).
- In any case the demand is revenue neutral, Appellate Authority have in para 5.11 observed as follows:-
  - The Appellants have pleaded that it is a case of revenue neutrality. I have carefully considered the defence plea that the case is fully covered by revenue neutrality. I agree with the defence contention that the entire exercise is revenue neutral since entire amount of Tax paid by them would be available to them as Cenvat credit on such capital goods.
- Thus, in view of the decision in case of M/s Anglo French Textiles 2018 (360) ELT 1016 (Tri.-Chennai) and in the case of M/s Hindustan Zinc Ltd. 2008 (232) ELT 687, the demand should have been dropped.

3.3 Learned Authorized Representative reiterates the findings recorded in the orders of the lower authorities.

4.1 We have considered the impugned orders along with the submissions made in appeal and during the course of argument.

4.2 On the merits of the issue impugned order records as follows:-

"5.3 It is an undisputed fact that the Appellants had manufactured moulds and cleared them without payment of duty to other factory under the cover of Challans and without issuing any invoice. Such manufactured moulds had not been accounted for in their Daily Stock Account. The Appellants have contended that moulds manufactured by them were capital goods for them and were captively consumed for the manufacture of their own goods. They have claimed exemption from duty on such moulds under notification no.67/95-CE dated 16.03.95 trying to carve out their case as that of non compliance of procedure having no importance at all.

5.4 Before proceeding further, it would be imperative to understand the importance of statutory procedures. I note that it is a well settled position in law that fiscal statute generally needs to comply strictly with the regulatory requirements that are important. Even the doctrine of substantial compliance to which the appellant have tried to sought relief, requires that the conditions or requirements that are important to invoke a tax or duty exemption should be complied with strictly. The doctrine forgives the non-compliance of either unimportant and tangential requirements or requirements that are so confusingly or incorrectly written that an earnest effort at compliance may be accepted as substantial compliance. I find that this is not the case here. The Rules 4, 10, 11, & 12 have been framed in a plain, clear and unambiguous language and redresses every possible difficulty faced by an assessee. These rules are quite plain and simple to understand and merely require recording and disclosure of transactions in accounts and returns. I do not find any practical difficulty in compliance of such rules. The Appellants failed to point out the difficulty faced by them in compliance of these rules. It merely shows that they care least for the statutory provisions on the subject. Contrary to the need to recognize the significance of such provisions, the Appellants have preferred to ignore them claiming to be mere procedural formality. The ***importance of procedure cannot be undermined in taxing statutes. Procedures are prescribed to prevent any possibility of fraud and misuse of a facility. In this regard I place reliance on following case laws***

(i) In the case of CCE Vs. Harichand Shri Gopal 2010 (260) ELT 3, 5 Member Bench of the Hon'ble Supreme Court held that object and purpose of the procedure should not be overlooked. Procedures are put in place to see that the goods be not diverted or utilized for some other purpose, on the guise of the

exemption notification. Hon'ble Supreme court also rejected the plea of "substantial law" and "procedural law" in this case. The Apex court explained in Para 24:-

24. The doctrine of substantial compliance is a judicial invention, equitable in nature, designed to avoid hardship in cases where a party does all that can reasonably expected of it, but failed or faulted in some minor or inconsequent aspects which cannot be described as the "essence" or the "substance" of the requirements. Like the concept of "reasonableness", the acceptance or otherwise of a plea of "substantial compliance" depends upon the facts and circumstances of each case and the purpose and object to be achieved and the context of the prerequisites which are essential to achieve the object and purpose of the rule or the regulation. Such a defence cannot be pleaded if clear statutory prerequisite which effectuates the object and the purpose of the statute has not been met. Certainly, it means that the Court should determine whether the statute has been followed sufficiently so as to carry out the intent for which the statute was enacted and not a mirror image type of strict compliance. Substantial compliance means "actual compliance in respect to the substance essential to every reasonable objective of the statute" and the court should determine whether the statute has been followed sufficiently so as to carry out the intent of the statute and accomplish the reasonable objectives for which it was passed. Fiscal statute generally seeks to preserve the need to comply strictly with regulatory requirements that are important, especially when a party seeks the benefits of an exemption clause that are important. Substantial compliance of an enactment is insisted, where *mandatory and directory requirements are lumped together, for in such a case, if mandatory requirements are complied with, it will be proper to say that the enactment has been substantially complied with notwithstanding the noncompliance of directory requirements. In cases where substantial compliance has been found, there has been actual compliance with the statute, albeit procedurally faulty. The doctrine of substantial compliance seeks to preserve the need to comply strictly with the conditions or requirements that are important to invoke a tax or duty exemption and to forgive non-compliance for either unimportant and tangential requirements or requirements that are so confusingly or incorrectly written that an earnest effort at compliance should be accepted. The test for determining the applicability of the substantial compliance doctrine has been the subject of a myriad of cases and quite often, the critical question to be examined is whether the requirements relate to the "substance" or "essence" of the statute, if so, strict adherence to those requirements is a precondition to give effect to that doctrine. On the other hand, if the requirements are procedural or directory in that they are not of the "essence" of the thing to be done but are given with a view to the orderly conduct of business, they may be fulfilled by substantial, if not strict compliance. In other words, a mere attempted compliance may not be sufficient, but actual compliance of those factors which are considered as essential.*

(ii) In the case of Indian Aluminium Company Ltd. Vs. Thane Municipal Corporation 1991 (55) ELT 454 (S.C.) Hon'ble Supreme Court of India observed:-

Para-3.......... .....Therefore the petitioner Company has definitely failed to fulfil an

important obligation under the law though procedural. The learned Counsel, however, submitted that even now the authorities can verify the necessary records which are audited and submitted to the authorities and find out whether the material was used in its own undertaking or not. We do not think we can accede to this contention. Having failed to file the necessary declaration he cannot now turn around and ask the authorities to make a verification of some records. The verification at the time when the raw material was still there is entirely different from a verification at a belated stage after it has ceased to be there. May be that the raw material was used in the industrial undertaking as claimed by the petitioner Company or it may not be. In any event the failure to file the necessary declaration has necessarily prevented the authorities to have a proper verification."

5.5 I also observe that the Appellants have contravened the provisions of Rule 4, 6, 8, 10, 11 & 12 of Central Excise Rules, 2002. Appellant's contention that department's allegations in this context are factually incorrect as the said goods were manufactured by them and issued for captive consumption. There was no contravention of any of the provisions mentioned in the show cause notice. I find that contention is not tenable as statutory provisions in regard to Production, Clearance of excisable goods by a manufacturer, as laid down under the Central Excise Rules, 2002 provides as under:

"Rule 10: Daily Stock Account: (1) Every assessee shall maintain proper records, on a daily basis, in a legible manner indicating the particulars regarding

description of the goods produced or manufactured, opening balance, quantity produced manufactured, inventory of goods quantity removed, assessable value, the amount of duty payable and particulars regarding amount of duty actually paid."

"Rule 4. Duty Payable on removal (1) Every person who produces or manufactures any excisable goods, or who stores such goods in'a warehouse, shall pay the duty leviable 'on such goods in the manner provided in Rule 8 or under any other law, and no excisable goods, on which any duty is payable, shall be removed without payment of duty from any place, where they are produced or manufactured, or from a warehouse, unless otherwise provided."

"Rule 11. Goods to be removed on invoice (1) No excisable goods shall be removed from a factory or his authorized agent and in the case of cigarettes, each such invoice shall also be countersigned by the Inspector of Central Excise or the Superintendent of Central Excise before the Cigarettes are removed from the factory."

"Rule 12 filing of Return (1) Every assessce shall submit to the Superintendent of Central Excise a monthly return, in the form specified by notification by the Board of production and removal of goods and other relevant particulars within ten days after the close of the month to which the return relates,"

5.6 I find that all these provisions relating to the manner of accounting of production, storage and removal of excisable goods, are kingpin of statutory mechanism to administer the levy and collection of Central Excise Duties i.e. a tax on production of goods. Unless any manufacturing activity is not duly recorded in the accounts books or disclosed in the Returns in accordance with the statutory scheme the department would be deprived of an opportunity to examine the feasibility of levy and collection *of Central Excise Duty. Thus non adherence to above provisions cannot be regarded as merely non compliance of unimportant procedure alone.*

5.7 I further find that moulds, in question, have been manufactured in the factory. They are not such moulds which were purchased from outside and on which credit of duty was availed. It is provided under rule 4 of the Central Excise Rules, 2002 that no excisable goods would be removed from the factory without payment of duty. It is further provided under rule 11, of the Central Excise Rules, 2002 that all excisable goods would be removed from the factory under cover of an invoice, in view of these two provisions it is clear that manufactured goods are required to be removed on payment of duty under cover of an invoice. In the absence of provisions that the capital goods which are used in job-workers' factory will also be exempted in notification no.67/95-CE dated 16.03.95, the benefits of said notification cannot be extended when capital goods are used in a factory other than the factory of production where such moulds are being used. It is found that in the case of CCE Jaipur Vs Mevvar Bartan Nirman Udyog, in CA No. 3269/2003, the Hon'ble Supreme Court in their judgment dated 30.09.2008 held that "We may also point out at this stage that it is well settled position in law that exemption Notification has to be read strictly. A notification of exemption has to be interpreted in terms of its language. Where the language is plain and clear, effect must be given to it. In Kedarnath Jute Manufacturing Co. v. Commercial Tax Officer, Calcutta and Ors., the Appellant a Public Limited Company, sought exemption under the provisions of the Bengal Finance (Sales Tax) Act, 1941 in respect of certain sales but did not produce before the Officer the declaration forms from the purchaser dealers required to be produced under the proviso to that sub-clause granting exemption. It was contended on behalf of the Appellant that proviso to the *sub-clause was only directory and the dealer is not precluded where the proviso is not strictly complied with from producing other relevant evidence to prove that the sales were for the purposes mentioned in the said sub-clause. The contention on behalf of the respondent was that the dealer can claim exemption under the sub-clause but he must comply strictly with the conditions under which the exemption can be granted. Rejecting the appellant's contention, the Supreme Court held :-*

> *"Section 5(2) (a) (ii) of the Act in effect exempts specified turnover of a dealer from sales tax. The provision prescribing the exemption shall, therefore, be strictly construed. The substantive clause gives the exemption and the proviso qualifies the substantive clause. In effect the proviso says that part of the turnover of the selling dealer covered by the terms of sub-clause (ii) will be exempted provided a declaration in the form prescribed is furnished. To put it in other words, a dealer cannot get the exemption unless he furnishes the declaration in the prescribed form."*
>
> ***It was further held as under:***
>
> *"There is an understandable reason for the stringency of the provisions. The object of Section 5(2) (a) (ii) of the Act and the rules made thereunder is self-evident. While they are obviously intended to give exemption to a dealer in respect of sales to registered dealers of specified classes of goods, it seeks also to prevent fraud and collusion in an attempt to evade tax. In the nature of things, in view of innumerable transactions that may be entered into between dealers, it will well-nigh be Impossible for the taxing authorities to ascertain in each case whether a dealer has sold the specified goods to another for the purposes mentioned in the section. Therefore, presumably to achieve the two-*

fold object, namely, prevention of fraud and facilitating administrative efficiency, the exemption given is made subject to a condition that the person claiming the exemption shall furnish a declaration form in the manner prescribed under the section. The liberal construction suggested will facilitate the commission of fraud and introduce administrative inconveniences, both of which the provisions of the said clauses seek to avoid."

It can thus be seen that the submission namely that the dealer, even without filing a declaration, can later prove his case by producing other evidence, is also rejected. This ratio applies on all fours to the case before us. As already mentioned the concession can be granted only if the raw material is used in the industrial undertaking seeking such concession. For that a verification was necessary and that is why in the rule itself it is mentioned that a declaration has to be filed in Form 14 facilitating verification. Failure to file the same would automatically disentitle the Company from claiming any such concession.

(Quoted with approval in the case of Indian Aluminium Company Ltd. Vs. Thane Municipal Corporation 1991 (55) ELT 454 (S.C.))

5.8 On perusal of the Notification No.67/95 C.E. it is revealed that exemption from Central Excise Duty on capital goods manufactured in a factory is available subject to the condition that such capital goods are used within the factory of production. I hold that the factory of job-worker, cannot be treated as extension of the manufacturing premises of the Appellants for the purpose of job work, even if for the sake of argument if it is to be considered as extension of the premises there were no need to set rules and procedures to send the good for job work to another premises. Consequently I hold that the Appellants have failed to comply with the statutory provisions of Rule 4, 10,

11 & 12 of the Central Excise Rules, 2002, they failed to account for the moulds and they failed to reflect the same in ER-1 returns. Moreover, they have failed to provide any plausible explanation before the adjudicating authority for not following such statutory provisions of Central Excise Rules. Thus, penalty under Rule 25 of the Central Excise Rules, read with Section 11AC is imposable upon the party.
5.9 In view of the above, I do not find any force in the plea of the party for claiming exemption on moulds removed by them from their factory premises to another factory of job-worker. In view of above discussion I do not agree with the contention advanced by the appellant and hold that they have violated the essential provisions of Central Excise in pith and substance."

4.3 We find force in the observations made in the impugned order with regards to availability of exemption under Notification No.67/95-CE. It is not in dispute that appellants are manufacturing the moulds, these moulds are the finished goods of the appellant which have to be cleared from the place of production only on payment of duty as applicable. As per exemption Notification No.67/95-CE, only those goods which are produced in the factory and used in the manufacture of finished goods which are cleared on payment of duty are exempt from duty. The goods which are finished goods by one person can be capital goods for another person. However, the same do not change the nature of the goods being finished goods that being so appellants claim to the benefit of exemption under Notification No.67/95-CE cannot be upheld. Even otherwise, it is now settled by Constitutional Bench of Hon'ble Supreme Court in the case of M/s Dilip Kumar & Company [2018-TIOL-302-SC-CUS-CB] that in case of ambiguity the benefit of such ambiguity should be given to the revenue. The relevant paras of the said decision of constitutional bench of Hon'ble Supreme Court isreproduced as follows:

"52. To sum up, we answer the reference holding as under-

(1) ***Exemption notification should be interpreted strictly; the burden of proving applicability would be on the assessee to show that his case comes within the parameters of the exemption clause or exemption notification.***

(2) ***When there is ambiguity in exemption notification which is subject to strict interpretation, the benefit of such ambiguity cannot be claimed by the subject/assessee and it must be interpreted in favour of the revenue.***

(3) ***The ratio in Sun Export case (supra) is not correct and all the decisions which took similar view as in Sun Export Case (supra) stands overruled."***

4.4 In view of the above decision, we do not find any merits in the submissions made on this account.

4.5 On the issue of revenue neutrality, we observed that the impugned order categorically held as follows:-

"The Appellants have pleaded that it is a case of revenue neutrality. I have carefully considered the defence plea that the case is fully covered by revenue neutrality. I agree with the defence contention that the entire exercise is revenue neutral since entire amount of Tax paid by them would be available to them as CENVAT credit on such capital goods However I am unable to understand that despite revenue neutral position when they were not bearing any incidence of the Tax payable by them for availability of CENVAT Credit why did they prefer to defy the law of the land and engaged themselves in contravention of various statutory provisions. I believe that revenue neutrality cannot be an alibi for not paying taxes in utter defiance to law enacted by Parliament. The whole

scheme of Cenvat credit as envisaged by the Cenvat Credit Rules, 2004 will become redundant if the proposition of revenue neutrality is invoked for non-payment of Service Tax or Central Excise duty on inputs/input services/capital goods. Such interpretation of law will be against the very basis of value added taxation system and leaves the discharge of tax liability at merely discretion of the Assessee. This can be illustrated by an example of payment of Customs duty against the raw materials imported by a manufacturer of excisable goods, whether the manufacturer importer can be allowed to not to pay CVD on the plea that the goods are to be utilized for manufacture of dutiable goods on which he is eligible to avail CENVAT credit. Certainly such interpretation cannot be accepted since it would leave the provision for levy of CVD redundant, as held by Hon'ble Supreme Court in the case of Balwant Singh Vs. Jagdish Singh wherein Hon'ble Supreme Court Observed that "It is also a well settled canon of interpretative jurisprudence that the court should not give such provisions which would render the provision ineffective or odious". Same views were echoed by Hon'ble Supreme Court in the case of Star Industries v. Commissioner 2015 (324) E.L.T. 656 (S.C.) -Para 35 of the Judgement reads as follows:-

35. It was submitted by the learned counsel for the assessee that the entire exercise is Revenue neutral because of the reason that the assessee would, in any case, get Cenvat credit of the duty paid. If that is so, this argument in the instant case rather goes against the assessee. Since the assessee is in appeal and if the exercise is Revenue neutral, then there was no need even to file the appeal. Be that as it may, if that is so, it is always open to the assessee to claim such a credit.

36. We, thus, do not find any merit in this appeal and dismiss the same with cost.

5.12 In this regard I am also placing reliance on the case of Shree Rainie Gums and Chemicals Pvt. Limited Vs. CCE Jaipur-II (2017(4) GSTL 340(Tri.-Del) Para 7 of the order passed by the Tribunal reads as follows:-

7. Before applying the principles of revenue neutrality, it is to be noted that the eligibility of credit to the appellant should be clearly established with supporting evidence. Further, the appellants' claim for refund of the said credit is subject to various conditions stipulated under Rule 5 of Cenvat Credit Rules, 2004 or Rule 18 of Central Excise Rules, (2002). We cannot record a categorical finding regarding the eligibility of the appellants for such benefits as these matters are not before for decision. As rightly contended by the Revenue that revenue neutrality as a concept will help the appellants to defend their case of bona fide belief against Service Tax liability and accordingly to defend against penal action or demand for extended period. The penal action and demand for extended period arises when the ingredients of suppression, wilful, misstatement, etc., are established. Further, we also note that there can be no general rule to the effect that the assessee need not pay tax if the same is available as a credit to them. In other words, a purported revenue neutral situation cannot, by any means, mitigate a tax liability of an assessee, which is otherwise payable in view of clear legal position of charging section and the tax entry, found correctly applicable to the assessee. The whole scheme of Cenvat credit as envisaged by the Cenvat Credit Rules, 2004 will become redundant if the proposition of revenue neutrality is invoked for non-payment of Service Tax or duty on inputs/input services. We find that such interpretation of law will be against the very basis of value added taxation and leaves the discharge of tax liability to the discretion of the assessee. We find no legal sanction for such interpretation.

5.13 I observe that in the case of M/s Matrix Telecom (2013) (32)STR 423 hon'ble tribunal held that revenue neutrality is a strong plea as the tax payer becomes eligible to avail Cenvat credit of the tax paid therefore there exist no reason to not to pay tax. Moreover situation leading to revenue neutrality should not be construed that Service Tax is not to be paid on time. When law requires that tax to be paid same has to be paid as per time schedule specified by the statute. It cannot be said that exchequer had not lost interest between two dates irrespective of the fact that assessee would have availed the Cenvat Credit on the very date the tax was paid and therefore Interest u/s 75 of the Finance Act-1994 is payable, as held by Hon'ble Tribunal in the case of Forbes Marshall Pvt. Limited 2015(38)STR843 (Tri-Mumbai). Similar, views have been expressed by Chandigarh Bench of Hon'ble Tribunal in the case of Surya Pharmaceuticals Limited-2016(43) STR 479 (Tri-Chan)."

4.6 In case of Kakateeya Fabs (P) Ltd [2018 (15) G.S.T.L. 350 (Tri. - Del.)] Delhi Bench held as follows:

"10. *…... Further, we also note there is a claim for exemption in terms of Notification No. 67/95 for capital goods manufactured in a factory and used within the factory of production as well as of excisable goods manufactured in a factory and used within the factory of production in or in relation to manufacture of final products. The said exemption has no application as the main appellant is not using the capital goods in the factory of manufacture. It appears that the manufacture is in the factory premises of NTPC. ….".*

In case of JBM Auto [2017 (357) E.L.T. 1107 (Tri. – Chan)] Chandigarh Bench has observed as follows:

"7. *We find that in this case the appellants have recovered the cost of tools and dies from M/s. Ashok Leyland Ltd. and M/s. Volvo India Pvt. Ltd. by raising debit* *notes. They also recovered sales tax by calculating Central Excise duty and treating the same as cum-duty price. However, they did not discharge Central Excise duty liability. Recovery of consideration in the form of debit notes and recovery of sales tax shows that effective sale has taken place. However, the goods have been retained by the appellants after their manufacture even though the ownership of the same was transferred to M/s. Ashok Leyland Ltd. and M/s. Volvo India Pvt. Ltd. The appellants raised invoices in their own favour (without discharging duty liability thereon) so as to give an impression of captive consumption under exemption Notification No. 67/95-C.E., dated 16-3-95. Benefit of Notification No. 67/95-C.E., is available for capital goods when they are produced and used within the factory of production. In the instant case, the goods have been sold to M/s. Ashok Leyland Ltd. and M/s. Volvo India Pvt. Ltd. Since the goods have been sold by the appellants, the Notification 67/95-C.E., is not applicable. Further, both the adjudicating authorities and first Appellate authority have given concurrent finding that the appellants did not produce any documentary evidence that the 'amortization cost' of the tools and dies manufactured by the appellants had already been included in the cost of components manufactured by said moulds. Therefore, it cannot be said that the appropriate duty has been paid on the components manufactured with the help of said tools and dies."*

4.7 In case of Steel authority of India Limited [2016 (334) E.L.T. 661 (Tri. - Del.)] Delhi Bench observed as follows:

"4.*We have heard both the sides and examined appeal records. The issue for decision is the duty liability of appellant on oxygen produced and supplied by them to their contractor located within the premises of appellant. The thrust of ld. counsel's argument is that the oxygen has not been cleared out of factory and hence exemption available* *in terms of Notification No. 67/95-C.E., for captive consumption is rightly claimed by them. The said notification exempts, inter alia, 'inputs' manufactured in a factory and used within the factory of production in or in relation to manufacture of final products. The said exemption in not available if the final product is exempted from whole of Excise duty leviable thereon***. The appellant claims that there is no clearance of oxygen outside their factory premises. However, it is an admitted fact that the recipient of oxygen is a corporate entity engaged in industrial activity having their own factory premises, though within the factory complex of appellants. The business arrangement and need is such that the impugned goods (oxygen) is cleared through pipeline to FSNL premises for further use. FSNL are using the said oxygen in the scrap recovery operation and are not registered with Central Excise department for any payment of duty on any final products. We find that the original authority fell in error in examining the issue like ownership of goods, free of cost supply and return of recovered scrap, etc., to arrive at the finding that there is no physical clearance or sale of goods and hence no duty liability. Clearance to FSNL through pipeline is an admitted fact. FSNL is a separate corporate entity having assigned factory premises of their own is also admitted. Sale for a consideration or ownership of goods are not relevant to decide Excise duty liability. The contractual arrangements to meet business needs do not take away the duty liability which may otherwise exist. FSNL have established a factory at a site provided by the appellant inside their factory premises as per contract agreement. The oxygen is cleared to FSNL and consumed by FSNL. The exemption contemplated under Notification No. 67/95 is available if inputs (here 'oxygen') manufactured in***

a factory is used within the factory of production. Oxygen produced by appellant is not used by appellants in their factory of production. The same is cleared to factory of FSNL and used by FSNL, though on behalf of appellant. We find the exemption as above cannot be extended in such situations.

4.8 Accordingly, we do not find any reason to hold contrary to the impugned order and we do not find any merits in the submissions made on this account.

4.9 The decisions relied upon by the appellant are distinguishable from the facts of the present case, in case of the M/s Zenith Machine Tools Pvt. Ltd. (supra) relied by the appellant the issue was in respect of clearance of the capital goods, not the finished goods produced in the factory of the manufacturer. The only issue in respect of the return of the said goods on which Cenvat credit has been taken within 180 days after job-work. Similarly, the decision in the case of Anglo French Textiles (supra), while the decision of Larger Bench of this Tribunal in the case of JAY YUHSHIN LTD. 2000 (119) E.L.T. 718 (Tribunal - LB) it has been held that in case of revenue neutrality the demand of duty is not sustainable. Larger Bench in fact observed as follows:-

> ***"11.*** *We have considered the rival submissions and have perused the case law. We find that in five cases in the list of cases referred to in Para 9 above and relied upon by the ld. Counsel for the appellants, viz., cases at Sl. Nos. 2,4,6,7 and 8, two options were available to the assessee, one of paying the duty at the time of clearance of the goods and the other, clearing the excisable goods without payment of duty either under some Exemption Notification or under some other legal provision. It was in such circumstances that the Tribunal had taken the view that when the option of clearing the goods without payment of duty was simultaneously available to the assessee, the non-*

paymert/short payment was not attributable to any intention to evade payment of duty. In the other seven cases viz., cases against Sl. No. 1,3,5,9,10,11 and 12 in the list of cases mentioned in Para 9 above, the option of availing Modvat credit was available to the assessee even though he was not availing of it. In the present case, the claim of the appellants that duty free clearance under Notfn. No. 214/86 was concurrently available to them and therefore no intention to evade duty payment can be inferred does not appear to merit acceptance since it is not in dispute that the appellants were admittedly availing of modvat credit under Rule 57A and Rule 57Q. There is also no evidence on record to show that MUL had given any undertaking under Para 2 of Notfn. No. 214/86 in relation to the manufactured items sold by the appellants to MUL. The said defence cannot therefore be accepted for want of factual substantiation. As regards the contention of the appellants that the SCN issued under Section 11A(1) would apply only to a situation where a duty payment is subsisting at the time of issue of notice and where no such outstanding duty liability exists at the time of issuing the SCN, we are of the view that a careful reading of Section 11A(1) does not allow such a construction to be put on the said provision. Inasmuch as Section 11A(1) gives power to the Central Excise Officer to serve a notice within a period of six months from the 'relevant date' from the date when non-levy/non-payment or short levy/short payment has occurred, we are of the view that so long as it is not in doubt that there has been an occurrance of non-levy/short levy/ or non-payment/short payment on the relevant date the pre-conditions for issuance of SCN *under Section 11A(1) are fully met and notice validly issued. In the instant case there is no dispute that clearance of excisable goods on short payment of duty had taken place. The fact that the differential duty was subsequently debited (albeit voluntarily) by the assessee before the issue of SCN will not debar the issuance of SCN in relation to the short payment occurring on the relevant date. Further, to the extent the appellants had stated in their price list declaration that no extra consideration had been received from the suppliers of the components despite the known fact that the said components were received free of cost, the allegation of suppression of facts in terms of the proviso to Section 11A(1) has to be held to have been established. The fact that there was a huge duty differential of an amount of over Rs. 55 lakhs between the duty paid by the appellants and debited by them later, is a strong circumstance which supports the inference of their intention to evade duty as the said amount has undeniably resulted in a financial gain for the appellants during the period and this financial gain flowed directly from the non-inclusion of the cost of the components in the assessable value. We are therefore satisfied that there will be no illegality in invoking the extended period of limitation under Section 11A(1) in a case like this.*

12. *As regards the demand of penalty under Section 11AC, as has been stated above the ingredients for invoking the said provision are in par materia with the ingredients to proviso to Section 11A(1). Having regard to the view we have taken above, where no legal infirmity in invoking the proviso to Section 11A(1) is shown to exist, there will also be no* *infirmity in invoking of penal provision under Section 11AC.*

13. *In the light of the above discussion, we answer the reference as under:*

(a) Revenue neutrality being a question of fact, the same is to be established in the facts of each case and not merely by showing the availability of an alternate scheme;

(b) Where the scheme opted for by the assessee is found to have been misused (in contradistinction to mere deviation or failure to observe all the conditions) the existence of an alternate scheme would not be an acceptable defence;

(c) With particular reference to Modvat scheme (which has occasioned this reference) it has to be shown that the Revenue neutral situation comes about in relation to the credit available to the assessee himself and not by way of availability of credit to the buyer of the assessee's manufactured goods;

(d) We express our opinion in favour of the view taken in the case of M/s. International Auto Products (P) Ltd. (supra) and endorse the proposition that once an assessee has chosen to pay duty, he has to take all the consequences of payment of duty."

4.10 In view of the above discussions we do not find any infirmity in the impugned order.

5.1 The appeal is dismissed.

(Pronounced in open court on-04 September, 2024)

(P.K. CHOUDHARY)
MEMBER (JUDICIAL)

(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

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