

**IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL
SOUTH ZONAL BENCH, CHENNAI**

E/491/2009

(Arising out of Order-in-Original No. 12/2004 dated 15.9.2004
passed by the Commissioner of Central Excise, Trichy)

M/s. Shree Ambika Sugars Ltd.

Appellant

Vs.

Commissioner of Central Excise, Trichy

Respondent

Appearance

Shri Raghavan Ramabhadran, Advocate for the Appellant
Shri R. Subramaniam, AC (AR) for the Respondent

CORAM

Hon'ble Ms. Sulekha Beevi C.S., Member (Judicial)
Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)

Date of Hearing / Decision: **29.08.2017**

Final Order No. 41907/2017

Per Bench

Brief facts are that the appellants are engaged in the manufacture of sugar and molasses and are registered with the Central Excise Department. On specific intelligence that some capital goods on which appellants had availed MODVAT credit and which were used for generating power was transferred by them during 2001 to their sister concern namely M/s. AURO Energy Ltd. (herein after referred to as AURO) without

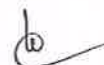


payment of duty, investigation was conducted. On scrutiny of records as well as statements recorded by the department it appeared that the appellants have contravened the provisions of the erstwhile Rule 57AB of Central Excise Rules, 1944. A show cause notice was issued alleging that appellants had sold capital goods on which MODVAT credit had been taken to AURO without payment of duty and contravening the provisions of Rule 57AB of Central Excise Rules, 1944 and proposing to demand duty to the tune of Rs.73,26,529/- along with interest and also for imposing penalties. After adjudication, the original authority confirmed the duty amount of Rs.65,37,354/- along with interest and imposed equal penalty under section 11AC of the Act. Being aggrieved, the appellants are now before the Tribunal.

2. On behalf of the appellant, Id. Counsel Shri Raghavan Ramabhadran submitted that the authority below has confirmed the duty demand on the allegation that the various capital goods used in the power plant has been transferred to the subsidiary company AURO. The appellant set up the unit in 1999 and being eligible for credit they availed the credit of duty paid on the capital goods for setting up the factory. During the said period, appellant also set up a co-generation plant comprising of the boiler and turbine for the generation of steam and electricity to be used in the manufacture of the final



products. The appellant uses bagasse as a fuel in the co-generation plant. The new subsidiary company AURO was set up in the year 1999 to carry out the business of generation and distribution of energy. Pursuant to an agreement dated 27.2.2011 entered by appellant with AURO, the appellant sold the boiler, turbine and various other capital goods which were installed in the co-generation plant to the new company, for a consideration of Rs.11.57 crores. In addition to the sale of plant and machinery, appellant also sold the land of 15.94 acres for a total consideration of Rs.18.97 lakhs. The fact of the sale of the co-generation plant was reflected in the balance sheet of the company for the relevant year. In the above background, the officers of the department visited the premises in 2002 – 2003 and appellants were issued show cause notice proposing to demand duty on the various capital goods transferred to AURO on the ground that pursuant to the sale there has been removal of capital goods and thus appellant has contravened the provisions of Rule 57AB(1)(c). Ld. Counsel submitted that "removal" contemplated under Rule 57AB(1)(c) is physical removal. That on sale of the co-generation plant, there was no physical removal of capital goods and therefore no duty is payable. To canvass this proposition, he relied upon the judgment in the case of J.K. Spinning and Weaving Mills Ltd. and Anr. Vs. Union of India &



Anr. – 1987 (32) ELT 234 (SC). Ld. Counsel adverted to para 38 of the said judgment and submitted that the Hon'ble Apex Court has observed that the word "removal" used in the Act contemplates shifting of a thing from one place to another. That in other words, it contemplates physical movement of goods from one place to another. That there was no 'removal' of capital goods and therefore the allegation that appellant contravened the provisions of law is not correct. It is also argued by the counsel that the very same issue came for consideration before the Hon'ble High Court of Madras in the case of Commissioner of Central Excise Vs. CESTAT – 2015 (323) ELT 290 (Mad.) wherein on similar set of facts when the capital goods were leased out, the Hon'ble High Court held that there was no removal of goods as contemplated under CENVAT Credit Rules. Further, in the case of L.G. Balakrishnan & Bros. Ltd. Vs. Commissioner of Central Excise, Trichy – 2016 (340) ELT 708, the Tribunal had occasion to consider the demand of duty on the allegation that capital goods were sold to the new entity formed by the appellant. The Tribunal in the said case held that when capital goods were transferred by sale there was no removal as contemplated in CENVAT Credit Rules. He therefore submitted that the duty demand is unsustainable.

3. Against this, Id. AR Shri R. Subramaniam reiterated the findings in the impugned order. He submitted that the



appellants have sold the capital goods / plant & machinery to another unit which is an admitted fact. That therefore the demand of duty, interest and the penalties imposed is legal and proper.

4. We have considered the submissions made by both sides.

5. To appreciate the issue under consideration, the relevant provision contained in the erstwhile Rule 57AB of Central Excise Rules, 1944 is reproduced as under:-

"Rule 57AB. CENVAT Credit -

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(b) The CENVAT credit may be utilized for payment of any duty of excise on any final products manufactured by the manufacturer or for payment of duty on inputs or capital goods themselves if such inputs are removed as such or after being partially processed, or such capital goods are removed as such.

Explanation - When inputs or capital goods are removed from the factory, the manufacturer of the final products shall pay the appropriate duty of excise leviable thereon as if such inputs or capital goods have been manufactured in the said factory, and such removal shall be made under the cover of an invoice prescribed under Rule 52A."

6. As seen from the above Explanation, the word used is 'removed'. When capital goods are removed from the factory, the manufacturer has to pay appropriate duty of excise as if such capital goods have been manufactured in the said factory and such removal shall be made under the cover of an invoice prescribed under Rule 52A. The law in the relevant Explanation does not use the word "sale" or "transfer of capital goods" but

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instead uses the word "removal" as capital goods from the factory. The meaning of the word "removal" ^{as ✓} ~~is~~ used in Central Excise law was considered by the Hon'ble Apex Court in the case of J.K. Spinning and Weaving Mills Ltd. (supra). The Hon'ble Apex Court held that removal contemplates physical removal of goods. The Hon'ble jurisdictional High Court in the case of Commissioner of Central Excise Vs. CESTAT reported in 2015 (323) ELT 290 (Mad.) had occasion to consider similar issue wherein the relevant portion of the questions of law framed in Civil Miscellaneous Appeal No. 3420/2008 and No. 3421/2008 are as under:-

"C.M.A. No. 3420/2008"

1. *Whether the inputs and capital goods used in a power plant and on which Cenvat credit of duty had been taken could be deemed as removed as such in terms of the provisions of Rule 3(5) of the Cenvat Credit Rules, 2004, when the right to use the said power plant along with the land, building, plant and machinery were leased by the assessee for consideration to another company?*

2. *Whether on such lease the assessee shall have to pay an amount equal to the credit availed in respect of such inputs or capital goods in terms of Rule 3(5) of the Cenvat Credit Rules, 2004, deeming the transfer of the right to use the said power plant comprising the land, building, plant and machinery to another company as removal as such?*

C.M.A. No. 3421/2008

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3. *Whether the power plant and the inputs, capital goods and input services used in the said power plant could be said to be an integral part of the factory of the assessee to be eligible inputs, capital goods and input services as defined in Rule 2(a), Rule 2(k) and 2(l) of the Cenvat Credit Rules, 2004, even after the lease resulting in transfer of the power plant from the possession and use of the assessee to another company?"*

7. The Hon'ble High Court referred to J.K. Spinning and Weaving Mills Ltd. (supra) and held that when the capital



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goods are transferred by lease, there was no removal of goods as contemplated under Rule 3(5) of CENVAT Credit Rules, 2004. The relevant portion of the judgment is reproduced as under:-

"16. On a plain reading of Rule 3(5) of the Cenvat Credit Rules, 2004, we find that Rule 3(5) only speaks about the removal of goods under cover of invoice referred to in Rule 9 on inputs or capital goods on which cenvat credit has been taken and if such goods are removed as such from the factory or premises of the provider of output service, the manufacturer of the final products or provider of output service, shall be liable to pay an amount equal to the credit availed in respect of such inputs or capital goods.

17. In this case, we find there is no removal of goods under cover of invoice as provided under Rule 9 of the Cenvat Credit Rules, 2004 and there is nothing in Rule 3(5) of the Cenvat Credit Rules, 2004 to invoke the deeming fiction as insisted by the adjudicating authority. The language of Rule 3(5) is plain and simple. When the inputs or capital goods on which cenvat credit has been taken are removed as such from the factory, then subject to compliance of other requirements, the credit availed in respect of inputs on capital goods shall be paid. This situation has not arisen in the present case, as no invoice has been issued for removal of the goods from the factory premises and, therefore, the said rule is not applicable to the case of the assessee."

8. The Tribunal in the case of Bilt Industrial Packaging Company Ltd. Vs. Commissioner of Central Excise, Salem – 2007 (216) ELT 217 had occasion to consider whether transfer of ownership of a factory as a whole (with all capital goods therein) would amount to physical removal of capital goods so as to recover the credit availed on the capital goods. The issue was held in favour of the assessee. Similar view was taken by the Tribunal in the case of LG Balakrishnan & Bros. Ltd. (supra). The relevant portion of the decision is as follows:-



"6. The main point for decision in this appeal is the liability of the appellant to pay an amount equal to credit availed on inputs, work-in-progress and capital goods consequent on sale/transfer of Chain Division, available at the time of transfer of the said division to M/s. RCIPL. The appellant's liability for penalty under Section 11AC is also a matter to be resolved.

7. The admitted facts of the case are that the appellant had two divisions in which the excisable goods are manufactured. The Chain Division has been transferred to a new joint venture company, which is created by the appellant with M/s. Renold International Holding Ltd., (RIHL). The new legal entity RCIPL has acquired/taken-over the Chain Division of the appellant. Consequent on such new arrangement, the appellant got their Central Excise registration suitably amended along with new area demarcation. The new entity also got Central Excise registration approved. At the time of such creation of new joint venture company, the capital goods, inputs and goods-in-process along with finished goods lying in the said Chain Division were also transferred to a new legal entity. The dispute is on the Cenvat credit reversal of inputs/capital goods as well as excise duty payment on the finished product.

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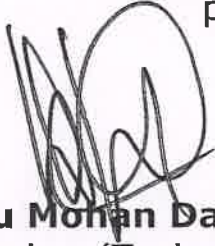
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10. In view of the above settled decision, we find that the provisions of Rule 3(5) are not attracted in the present case. The original authority's attempt to distinguish the above findings is not appropriate. He found that these decisions are regarding change of ownership of whole factory whereas here only a part of the factory is transferred. We find such finding as untenable. Further, regarding question of issue of invoice by the appellant for sale and transfer of capital goods and inputs to the new legal entity, we find on perusal of sample invoice that these are not invoices in terms of Rule 11 of Central Excise Rules, 2002. The appellant contended that the goods were identified with value for the purpose of business transaction and not for sale transaction in terms of Sales Tax or Central Excise provision. We note that the invoices issued did not contain the details of any removal, mode of transport, rate of duty, duty payable thereon, etc., as per the requirement of Rule 11(2) of Central Excise Rules, 2002. We also note that based on these invoices no credit can be availed by any buyer as these are not in terms of Rule 9 of Cenvat Credit Rules, 2004. In view of settled legal position regarding need for physical removal of capital goods or inputs, in order to attract the provisions of Rule 3(5) of Cenvat Credit Rules, 2004, we find that there is no justification to invoke such provision to demand and recover any amount from the appellant in this case. As such, we find no justification for the confirmation of demand towards capital goods. The same reasoning is applicable to the recovery of amount for the inputs amounting to Rs. 91,76,449/-. The demand towards such recovery is also not sustainable. There is no allegation or finding regarding any irregular credit availed on inputs or capital goods or usage of these goods for other than approved purposes."



9. The facts being identical, following the above judgments / decisions, we are of the view that the demand is unsustainable. The impugned order is set aside and the appeal is allowed with consequential relief, if any.

(Operative portion of the order was pronounced in open court)



(Madhu Mohan Damodhar)
Member (Technical)



(Sulekha Beevi C.S.)
Member (Judicial)

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सहायक पंजीकार / Asst. Registrar
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अपील अधिकारी / (CESTAT)
चेन्नई / CHENNAI