M/S. Jayaswal Neco Ltd vs Commnr. Of Central Excise, Raipur on 6 August, 2015

Equivalent citations: 2015 AIR SCW 4647, 2015 (10) SCC 651, AIR 2015 SC (SUPP) 2187, (2016) 157 ALLINDCAS 12 (SC), (2015) 4 KCCR 558, (2015) 6 MAD LJ 248, (2015) 8 SCALE 550

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Bench: N.V. Ramana, A.K. Sikri

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 1468 OF 2004

M/S JAYASWAL NECO LTD.	.....APPELLANT(S)	
VERSUS		
COMMISSIONER OF CENTRAL EXCISE, RAIPUR	.....RESPONDENT(S)	

WITH

CIVIL APPEAL NO. 7386 OF 2005

J U D G M E N T

A.K. SIKRI, J.

The issue involved in these appeals lies in a narrow compass which pertains to the demand of interest calculated on the dues of excise duty which were allegedly deposited late. The period involved is 19.12.2000 and 18.02.2001, i.e., two months. The only question is as to whether the excise duty was in fact deposited late and therefore interest would be charged. This issue has arisen under the following circumstances in Civil Appeal No. 1468 of 2004.

The appellant/assessee is the manufacturer of pig iron and scrap of iron on which he pays excise duty. The Central Excise Rules, at the relevant time, permitted payment of duty every fortnight instead of consignment basis. In this manner on the goods cleared in the first fortnight the duty was payable by 20th of the said month and for the goods cleared during the second fortnight the duty was payable by 5th May of the next month. The Revenue Authorities found that in the months of August, October and November 2000, the appellants had not paid the central excise duty on time.

This led to the passing of an order by the Revenue suspending the facility of clearing goods of paying the duty every fortnight and interest. Instead, the appellant was directed to make the payment of duty on consignment basis for a period of two months, i.e., from 19.12.2000 to 18.02.2001.

After the said orders were passed the appellant started paying duties on consignment basis. During this period the appellant paid around Rs.7 crores in cash through account current, i.e., PLA. However, the appellant also had credit in their Cenvat Account. A sum of Rs. 31 lakhs (approximately) was utilized from the Cenvat Account for payment of excise duty in the aforesaid period. The authorities took the view that the appellant could not have utilized the credit from the account. The appellant was asked to pay the said sum in cash and the appellant obliged. Since this payment was made later/belatedly, the Commissioner (Excise) issued the show cause notice as to why the interest at the rate of 24% per annum should not be charged for the belated period, i.e., from 19.12.2000 to 20.05.2002. The appellant refuted the aforesaid averment in the show cause notice with the submission that the payment through Cenvat account was also a valid payment. This contention was not accepted by the Commissioner which resulted in Order-in-Original dated 13.06.2002 charging interest for delayed payment at the rate of 24% p.a. for the aforesaid period. The reason given by the Commissioner was that since the facility to pay the central excise duty in installments given to the appellant was withdrawn under sub-rule (e) of Rule 173G of the Central Excise Rules, 1944 for a period of two months, it was not open to the appellant to make use of Cenvat account during this period. As per the Commissioner, the implication of the aforesaid withdrawal of facility was to pay the excise duty for each consignment by debit to the account current, i.e., by cash only.

The appellant assailed the aforesaid order by filing appeal before the Customs Excise and Service Tax Appellate Tribunal (CESTAT). CESTAT has affirmed the order of the Commissioner holding that payment of duty by debiting the Cenvat Credit was not permissible during the said period of two months and therefore it would amount to non-payment of duty. As a consequence, interest was held to be payable till the date duty was actually paid through cash.

The moot question is as to whether it was not permissible for the appellant to utilize the Cenvat Credit during the aforesaid period of two months when facility for payment of duty fortnightly under Rule 173G was suspended. To put it otherwise, when the duty during this period was to be paid on consignment basis, it was also incumbent to pay the same in cash only and utilisation of Cenvat Credit was also forfeited during this period.

We have heard the learned counsel for the parties on the aforesaid issues who have taken us through the relevant provisions contained in Central Excise Act as well as Rules. Section 11A of the Act permits the Central Excise Officer to recover duty not levied or not paid or short levied or short paid or erroneously refunded. It can be done within one year from the relevant date by serving show cause notice on the person chargeable with the duty. It is not necessary to state in detail the procedure prescribed therein. For our purposes it is sufficient to mention that Section 11AA of the Act provides that where a person chargeable with duty determined under Section 11A fails to pay such duty within three months from the date of such determination, he is liable to pay interest on the delayed period which is at the rate not below 18% and not exceeding 36% p.a. as for the time

being fixed by the Central Government by Notification in the Official Gazette.

Chapter III of the Rules deals with 'Levy and Refund of, and Exemption from Duty'. Rule 9 thereof stipulates time and manner of payment of duty and sub- rule 1 thereof reads as under:

> "Rule 9: Time and manner of payment of Duty:-(1) No excisable goods shall be removed from any place where they are produced, cured, manufactured or any premises appurtenant thereto, which may be specified by (Commissioner) in this behalf, whether for consumption, export or manufacture of any other commodity in or outside such place, until (excise duty leviable thereon is determined and indicated on each application in the proper form or each gate pass, as the case may be, presented to the proper officer at such place and in such manner as is prescribed in these rules or as the Commissioner may require." The next Rule relevant for our purpose is Rule 173G which is textually very long dealing with various aspects. It prescribes the procedure that has to be followed by the assessee for the purpose of discharging his duty/liability in respect of clearances of excisable goods from the place of permission specified under Rule 9 or from a store room or other place, storage approved by the Commissioner under Rule 47.
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> Eschewing the portion which is not relevant for us, we reproduce that part of the Rule which is concerned with this case, reads as under:
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> "Rule 173G. Procedure to be followed by the assessee.-[(1)(a) Every manufacturer, other than a manufacturer who is availing of the exemption under a notification based on value of clearances in a financial year, shall discharge his duty liability in respect of clearances of excisable goods from the place or premises specified under rule 9 or from a store room or other place of storage approved by the Commissioner under rule 47 made:
>
> (i) during the first fortnight of the month, by the twentieth day of that month;
>
> (ii) during the second fortnight of the month, other than the month of March, by the fifth day of the succeeding month; and xx xx xx
>
> (b) The manufacturer shall maintain an account current with the Commissioner and shall discharge his duty liability by debiting such account current or by utilising CENVAT credit, in the following manner: (I) the manufacturer shall assess the duty due on the excisable goods intended to be removed, for each consignment and shall enter the particulars of such consignments [amount of duty payable had been substituted, the words and figures in Daily Stock Account maintained under Rule 53];
>
> (ii) the manufacturer shall indicate on each invoice, issued under rule 52A, the amount of duty payable.

(iii) at the end of each fortnight, the manufacturer shall determine the total amount of excise duty payable on the excisable goods removed during the fortnight, and he shall discharge the total duty liability so payable by making debit entry in the account current or by utilising CENVAT credit, as the case may be.

(c) the duty of excise shall be deemed to have been paid for the purpose of these rules, on excisable goods removed in the manner prescribed in this sub-rule, and the credit of such duty, as may be prescribed, under any rule, will be permissible.

(d) If the manufacturer fails to pay the amount of duty payable by the due date, he shall be liable to pay the outstanding amount along with interest at the rate of twenty four per cent per annum on the outstanding amount, for the period starting with the first day after due date till the date of actual payment of the outstanding amount.

(e) If the manufacturer defaults on account of any of the following reasons, namely:-

(i) full payment of any one instalment is discharged beyond a period of thirty days from the date on which the instalment was due in a financial year, or

(ii) the due date on which full payment of instalments are to be made is violated for the third time in a financial year, whether in succession or otherwise, then the manufacturer shall forfeit the facility to pay the dues in instalments under this sub-rule for a period of two months, starting from the date of communication of an order passed by the proper officer in this regard and during this period the manufacturer shall be required to pay excise duty for each consignment by debit to the account current referred to in clause (b) and in the event of any such failure it will be deemed as if such goods have been cleared without payment of duty and the consequences and penalties as provided in the Central Excise Rules shall follow." Clause (a) of sub-rule (1) permits the fortnight payments of excise duty.

Clause (b) mandates maintaining of a current account with the Commissioner and states that duty can be discharged by debiting such current account or by utilizing Cenvat Credit. As per clause (c) once the duty is paid in the prescribed manner i.e. as per sub-rule (b) it would amount to discharging the liability of payment of excise duty. On failure to pay the duty by the due date interest at the rate of 24% p.a. can be charged on the delayed payment. Sub-rule (e) deals with the situation where the manufacturer commits default on account of payment of duty for the reasons mentioned therein and in such a case the authorities can forfeit the facility to pay the dues in installments under these sub-rule for a period of two months.

In the present case, no doubt, this facility was withdrawn under Rule 173G(1)(e). The effect of withdrawal of this facility would be that the appellant was not permitted to pay the duty every fortnight as per clause

(a) of sub-rule (1). Instead the appellant was required to pay the duty for each consignment.

It is not in dispute that the appellant paid the duty on clearing each consignment. Substantial portion of the duty, i.e., to the tune of Rs.7 crores was paid in account current through PLA. However, for payment of small portion of a duty which was in the neighbourhood of Rs.31 lakhs, the appellant utilised Cenvat Credit Account. It is this payment from Cenvat Credit which has become the bone of contention. The respondent communicated to the appellant that duty through Cenvat during this period, when facility under Rule 173G was withdrawn, is not permissible. Without demur, the appellant complied with the demand of the respondent by paying this portion of duty also through account current. However, this happened in May, 2002. The respondent now took the position that the custom duty of Rs.31 lakhs was paid belatedly. As it was paid only in May, 2002, on this delayed payment, appellant was liable to pay interest @ 24% p.a. from the period from 19.12.2000 to 20.05.2002. Order-in-Original dated 13.06.2002 passed by the Commissioner affirming the demand in show cause notice has been confirmed by the Tribunal. The reason given by the Tribunal is that it was admitted by the appellant that facility of payment of duty by installments had been withdrawn for two months. It was also admitted by the appellant that during this period, the appellant discharged a portion of duty through Cenvat Credit Account but afterwards paid this amount of duty in cash and, therefore, admitted that payment of duty through Cenvat Credit Account was not permissible under the provisions of sub-rule (e) of Rule 173G(1) of the Rules. According to the Tribunal, since these were the admitted facts, the interest @24% p.a. which is prescribed for late payment, was rightly claimed by the Department.

At the outset, we are compelled to remark that the Tribunal was not correct in observing that merely because the appellant paid the aforesaid portion of duty subsequently in cash, it had accepted the legal position that payment of duty through Cenvat Credit Account was not permissible under the provisions of Rule 173G(1)(e) of the Rules. Whether such a course of action was permissible or not had to be examined in the light of the legal provisions. There is no estoppel against law. Merely because the appellant had yielded to the demand of the Revenue to pay that portion of duty also in cash, would not mean that the appellant was precluded from taking a stand that such mode of payment through Cenvat Credit Account even during the period when facility of payment of duty by instalments had been withdrawn for two months, was permissible. It had taken a specific defence in this behalf and, therefore, the Tribunal was required to examine the matter in the light of the aforesaid Rule. We have already extracted relevant portion of Rule 173G. Since, we are specifically concerned with sub-rule (e) thereof, for clarity and better understanding of the matter, we reproduce the same once again:

> “Section 173G(1) xx xx xx
>
> (e) If the manufacturer defaults on account of any of the following reasons, namely:-
>
> (i) full payment of any one instalment is discharged beyond a period of thirty days from the date on which the instalment was due in a financial year, or
>
> (ii) the due date on which full payment of instalments are to be made is violated for the third time in a financial year, whether in succession or otherwise, then the manufacturer shall forfeit the facility to pay the dues in instalments under this

> sub-rule for a period of two months, starting from the date of communication of an order passed by the proper officer in this regard and during this period the manufacturer shall be required to pay excise duty for each consignment by debit to the account current referred to in clause (b) and in the event of any such failure it will be deemed as if such goods have been cleared without payment of duty and the consequences and penalties as provided in the Central Excise Rules shall follow.

(emphasis supplied)" As already mentioned above, this clause enables the authorities to forfeit the facility to pay the dues in instalments for a period of two months in case the assessee commits default of the nature specified therein. Thus, the main purport of this Rule is to withdraw the facility of payment of dues in instalments and calling upon the assessee to pay the duty during the aforesaid period on clearing each consignment, i.e., on everyday basis. In this context, the question that arises is as to whether such a duty has to be necessarily paid only by debit to the account current or it can be paid through Cenvat Credit as well.

For answering this question, first thing that is necessarily to be pointed out is the purport behind Rule 49 and Rule 173G of the Rules. Rule 49 enables the assessee to pay excise duty on fortnightly basis on removal of goods from the factory premises or from an approved place of removal but for this Rule the assessee is required to pay duty on removal of each consignment, i.e. on consignment to consignment basis. That is what is provided in Rule 9 of the Rules which mandates that no excisable goods shall be removed from the place where they are produced, cured or manufactured or any premises pertained thereto, which may be specified by the Commissioner in this behalf, whether for consumption, export or manufacture of any other commodity in or outside such place, until excise duty leviable thereon is determined and indicated on each application in the proper form or each gate pass, as the case may be, presented to the proper officer at such place and in such manner, as may be prescribed in these Rules or as the Commissioner may require. However, Rule 49 gives facility to the assessees to remove the goods without paying the duty immediately but allowing it to pay it on fortnightly basis as provided therein. At the same time, this facility is given to the manufacturer/assessee on the premise that he faithfully pays the duty every fortnight, by specified dates which are stipulated in Rule 173G. In case defaults are committed by the assessee, its consequences are also provided in the said Rule. For certain specified nature of defaults mentioned in Clause (e) of Rule 173G(1), this facility to pay the dues in instalments on fortnightly basis is to be forfeited for a period of two months.

What follows from the aforesaid scheme discernible from the combined reading of Rules 9, 49 and 173G(1) is that focus of these Rules is on the manner in which duty is to be paid, namely, on daily basis or on fortnightly basis. The mode of payment of duty is altogether different aspect.

In sub-para (b) of Rule 173G, a duty has been cast on the manufacturer to maintain an account current with the Commissioner for the purpose of discharging his duty liability by debiting such account current. This sub- rule also provides that duty can be discharged by utilising Cenvat Credit in the manner mentioned in the said sub-rule. Thus, insofar as mode of payment is concerned, it can be through account current or by utilising Cenvat Credit. Both the methods are permissible. The mode of payment of duty through Cenvat Credit is as good as making payment through account

current. This Court in Commissioner of Central Excise, Pune v. Dai Ichi Karkaria Limited[1] described credit under the Modvat scheme to be "as good as tax paid". The reasons for the aforesaid view taken by the Court are contained in paras 17 and 18 of the judgment which may be recapitulated as under:

> "17. It is clear from these Rules, as we read them, that a manufacturer obtains credit for the excise duty paid on raw material to be used by him in the production of an excisable product immediately it makes the requisite declaration and obtains an acknowledgment thereof. It is entitled to use the credit at any time thereafter when making payment of excise duty on the excisable product. There is no provision in the Rules which provides for a reversal of the credit by the excise authorities except where it has been illegally or irregularly taken, in which event it stands cancelled or, if utilised, has to be paid for. We are here really concerned with credit that has been validly taken, and its benefit is available to the manufacturer without any limitation in time or otherwise unless the manufacturer itself chooses not to use the raw material in its excisable product. The credit is, therefore, indefeasible. It should also be noted that there is no co-relation of the raw material and the final product; that is to say, it is not as if credit can be taken only on a final product that is manufactured out of the particular raw material to which the credit is related. The credit may be taken against the excise duty on a final product manufactured on the very day that it becomes available.
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> 18. It is, therefore, that in the case of Eicher Motors Ltd. v. Union of India [1999 (106) E.L.T. 3] this Court said that a credit under the Modvat scheme was "as good as tax paid." When we understand the character of Cenvat Credit in the aforesaid manner, the answer to the question posed easily becomes available, namely, even during the period when the facility of payment of excise duty in instalments on fortnightly basis is not available and remains suspended for a period of two years, the only obligation for the assessee is to pay the duty on each clearance and not on deferred basis. At the same time, insofar as manner of duty is concerned, it can be either through account current or Cenvat Credit.

We are conscious of the words "during this period the manufacturer shall be required to pay excise duty for each consignment by debit to the account current referred to in Clause (b) ....." occurring in clause (e). It is on the basis of this language used in Clause (e) of Rule 173G(1), the argument of the learned senior counsel for the Revenue is that the only mode or manner of payment of duty during this period was through account current. However, it is not possible to agree with this contention in the absence of specific prohibition contained in the said sub-rule (e) in this behalf coupled with the fact that the payment of excise duty through Cenvat Credit is recognised as a valid mode of payment. In fact, as would be noticed below, the Department itself understood the scope and purport of the aforesaid provision in this very manner, as it existed at that time.

In this behalf, it also required to emphasize that the Central Government introduced a scheme namely MODVAT Scheme in the Central Excise Law as introduced by a separate Chapter containing

Rule 57A to 57(U) from 1986. As per the MODVAT credit scheme introduced by the aforesaid Rules, the manufacture of certain final products which are excisable goods specified in the notification issued by the Government, is allowed credit of any duty to excise paid by him on the input which is used in the manufacture of the final product. The credit of specified duty allowed is to be utilised towards payment of duty excise allowable on the final product whether under the Act or under any other Act as the case may be by the notification issued and subject to such conditions as may be specified. As per Rule 57F, the inputs on which credits have been taken may be used in or in relation to the manufacture of final products and the inputs may be removed for home consumption or for export under bond. As per this rule, all the removals of inputs for home consumption shall be made on payment of duty equal to the amount of credit availed in respect of such inputs and under the cover of invoice prescribed under Rule 52A. The inputs can also be removed as such or after they have been partially processed by the manufacturer of the final products to a place outside the factory under the cover of a challan specified in that behalf by the Central Board of Excise and Customs, for the purpose of test, repair etc. carrying out any operation necessary for manufacture of final products and return the same to his factory within the specified period. The inputs on which credit has been taken may be used for the manufacture of final products or can be removed after payment of duty for home consumption. Rule 57-I provides for recovery of credit wrongly availed of or utilised in an irregular manner. It provides for recovery of the duty credit of which was wrongly availed and if the manufacturer has taken the credit by reason of fraud or willful misrepresentation, suppression of facts etc. with the intention to evade payment of duty then he shall, apart from his liability to pay the amount equivalent to the credit, be liable to pay penalty equal to the same amount plus interest under Section 11AA.

The Scheme is thus, a self-contained one, dealing with its applicability, eligibility of credit of duty on certain inputs, adjustment to be made on the credit of inputs used in final products, manner of utilisation of inputs, procedure to be followed by the manufacturer, procedure to be followed by the persons who have availed credit issued in invoice and finally provision for recovery of credits wrongly availed and a provision for imposing penalty for violation of the provisions and availing wrong credit. With the introduction of this new scheme, the assessee had the option to pay excise duty by availing credit of the duty paid on inputs provided he is a manufacturer of the finished products making use of such inputs.

This provision came up for interpretation before at least four High Courts and all these Courts took the view that even when the facility is withdrawn for making payment in instalments, the excise duty can be paid through Cenvat Credit. It is not necessary to refer to all these judgments. Suffice it is to make a mention of the decision dated 26.10.2005 in C.E.Appeal No. 22 of 2005 rendered by Kerala High Court in Thanikkudam Bagawati Mills Limited, Thanikkudam v. The Commissioner of Central Excise, Calicut. In this judgment, the High Court after analysing the Rules as well as the provisions of Modvat scheme summed up the position as under:

> “23. It is true that as per rule 173G(1)(b) also the payment utilising Cenvat credit is an approved manner of payment of duty by these rules. It is equally true that even in the absence of such a provision contained in Rule 173G(1)(b) accepting the mode of payment utilising Cenvat credit, an assessee, even by virtue of the provisions

contained under Rule 49 read with Rule 57A, will be entitled to utilise such input credit. In other words, there is force in the contention of the assessee that Rule 173G does not give any benefit of any input credit and merely by referring to the entitlement of the assessee to use the Cenvat credit again under Rule 173G and further providing that the assessee has to pay the duty during the suspended period for each consignment by debit from the account current only in no way will have the effect of taking away the already conferred benefit by separate rule. So long as no amendment is brought out to Rule 49 or Rule 57A, as the case may be, the consequences of making an assessee a defaulter and to deny him the benefit of utilising the input credit will become unworkable and ineffective. It has to be noticed as rightly pointed by the counsel appearing for the petitioner that the rule making authority took notice of this lacuna and by the Central Excise Rules, 2002 – second amendment 2005, which came into force from 1st April, 2005, the Central Excise Rules 2002 was amended and Rule 3A was inserted which reads as follows:

"If the assessee defaults in payment of duty by the date prescribed in sub-rule (2) and the same is discharged beyond a period of thirty days from the said date, then the assessee shall forfeit the facility to pay the duty in monthly instalments under sub-rule (1) for a period of two months, starting from the date of communication of the order passed by the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, in this regard or till such date on which all dues including interest thereof are paid, whichever is later, and during this period notwithstanding anything contained in sub-rule (4) of rule 3 of CENVAT Credit Rules, 2004, the assessee shall be required to pay excise duty for each consignment by debit to the account current and in the event of any failure, it shall be deemed that such goods have been cleared without payment of duty and the consequences and penalties as provided in these rules shall follow."

24. It is for the first time that a non obstantive clause was added so as to take away the benefit under the Cenvat Credit rules and to utilise the input credit during the operation of the suspended period and requiring any duty by debit to the account current only. Until then, as is already referred to above, merely because rule 173G recognises the payment of duty utilising the Cenvat credit also and providing for payment of duty through open and current account only during the suspended period will not have the effect of taking away the benefit conferred by a separate rule since even without Rule 173G by virtue of Rule 49 read with Rule 57A a right has already conferred on the assessee to utilise the input credit for payment of duty at the time of discharging his liability to pay duty on the final product as provided for in the rules." Not only we are in agreement with the aforesaid view taken by the High Courts, it is imperative to point out that even the Department accepted the aforesaid opinion of the High Courts. For this reason, judgments rendered by the High Courts were not challenged and instead to remedy the situation, Rule 8 of the Central Excise Rules, 2002 itself is amended by inserting sub- rule 3A vide Notification No.17/05-C.E. (N.T.) dated 31.03.2005 w.e.f. 01.04.2005. This Rule now specifically provides that in

> case of default in making payment of duty, the assessee shall be required to pay excise duty for each consignment by debit to the account current and not by utilising Cenvat Credit. This also lends credence to our view which we have taken in respect of unamended provision that was applicable at the relevant time.

The result of the aforesaid discussion would be to allow these appeals and set aside the decision of the CESTAT. We order accordingly.

.....J. (A.K. SIKRI) .....J. (N.V. RAMANA) NEW DELHI;

AUGUST 06, 2015.

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[2] 1999 (112) ELT 353 (SC)