

**Central Cables Pvt. Ltd. Vs. Collector of Central Excise**

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**SooperKanoon Citation :** [sooperkanoon.com/5949](http://sooperkanoon.com/5949)

**Court :** Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

**Decided On :** Sep-09-1990

**Reported in :** (1991)(51)ELT385TriDel

**Appellant :** Central Cables Pvt. Ltd.

**Respondent :** Collector of Central Excise

**Judgement :**

1. The above captioned four appellants have filed four appeals being aggrieved by a common order passed by the Collector of Central Excise, Nagpur. Simultaneously the stay applications duly supported with affidavits have also been filed. The particulars are as under :-

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Name	of	the	party	Duty	Amount	Penalty
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Amount	No.					
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E/Stay/2098/90-BI in 16,44,436.00 1,50,000.00 appeal No. E/2852/90-B12.

E/Stay/2096/90-BI in 16,44,436.91 25,000.00 appeal No. E/2850/90-B13.

E/Stay/2097/90-BI in 16,44,436.91 25,000.00 appeal No. E/2851/90-B14.

E/Stay/2099/90-BI in 16,44,436.91 25,000.00 appeal No. E/2853/90-B1

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2. Since the above captioned four appeals emerge from a common order and the stay applications emerge from four appeals, the same are being disposed of by this

common orders.

3. Shri V. Sridharan, the learned advocate with Shri Govind Das Daga, Chairman and Managing Director of Central Cables Pvt. Ltd. has appeared on behalf of the applicants. He has reiterated the contentions made in the stay applications. Shri V. Sridharan, the learned advocate pleaded that prima facie the applicants have got a good case on merits and the applicants are engaged in the manufacture of electric wires and cables falling under Heading 85.44 of the Schedule to the Central Excise Tariff Act, 1985, and during the relevant period the applicant was working under the MODVAT scheme as laid down in Part AA of Chapter V of the Central Excise Rules, 1944. Shri Sridharan, the learned advocate pleaded that the duty demand from M/s. Central Cables Private Ltd. was not correct in law. If at all any duty is to be paid, the same has to be paid by job workers, namely, Omega Scientific Co., Nagpur, Vidharbha Cables, Nagpur and Capacitors Co. Pvt. Ltd., Nagpur, as copper/aluminium rods were sent to these three units on job work basis for conversion into copper/aluminium wires and these units are entitled to the benefit of exemption being small scale units. Shri Sridharan argued that the applicants had given copper ingots to another party for conversion into wire rods and those copper ingots were processed into wire rods by that party and had cleared them on payment of excise duty and the excise G.P.'s were issued in the applicants' name, namely, Central Cables Pvt. Ltd. and aluminium rods were purchased from BALCO and HINDALCO on excise G.P.'s issued in the name of the applicants and the copper/aluminium rods so received were not utilised by the applicants and were sent to these three units, namely, (i) M/s. Omega Scientific Co. Nagpur, (ii) M/s Vidharbha Cables, Nagpur and (iii) M/s.

Central Capacitors, Nagpur for conversion into copper/aluminium wires.

Shri Sridharan, the learned advocate argued that no entries of wire rods of copper/aluminium were made in the RG-23A Part I and II accounts i.e. MOD-VAT accounts and no MODVAT credit of duty paid thereon was taken by the applicants, namely, Central Cables Private Ltd. Instead, the gate passes in the applicants' name were endorsed in the names of these three units and for accounting purposes only, these were entered in the applicants' store record. Shri Sridharan

further argued that these three small units are eligible to the benefit of Notification No.175/86 and these units had also opted for MODVAT scheme. Shri Sridharan, the learned advocate in support of his argument referred to a judgment of the Supreme Court in the case of Commissioner of Wealth-Tax, Gujarat II, Ahmedabad v. Shri Arvind Narottam reported in AIR 1988 S.C. 1824. He has pleaded that the MODVAT is not applicable in the present case. He has pleaded for the acceptance of the stay applications. Shri Sridharan, the learned advocate referred to Rule 57F and pleaded that there is no default under that rule and as such, he pleaded that prima facie the applicants have got a good case on merits.

4. Shri Sridharan on financial aspect pleaded that the financial position of the applicants is not very sound. In support of the same, he referred to the provisional balance-sheet of the applicants for the year ending 31st March, 1990 and the net profit as per profit and loss statement is Rs. 12,64,786.00. He also filed an audited copy of the balance-sheet and profit and loss account for the year ending 31st March, 1989 and the net profit is Rs. 32,29,527.81. Shri Sridharan argued that in case the applicants are desired to deposit the full duty amount and penalty amount, it will amount to undue hardship. He has pleaded for dispensing with the same and also for grant of stay in the case of Central Cables Pvt. Ltd. and the other three concerns.

5. Shri Prabhat Kumar, the learned JDR who has appeared on behalf of the respondent, pleaded that the applicants have made a device to evade central excise duty. In support of his argument, he has referred to a judgment of the Supreme Court in the case of Bajrang Gopilal Gajabi v.M.N. Balkundri and Ors. reported in 1986 (25) ELT 609. He has also referred to a judgment of the Tribunal in the case of H. Guru Instruments (P) Ltd., Calcutta v. Collr. of C. Ex., Calcutta reported in 1987 (27) ELT 269 and in the case of Shree Agency v. S.K.Bhattacharjee and Ors. reported in 1977 (1) ELT J-168. He has also referred to a judgment of the Supreme Court in the case of McDowell & Co. Ltd. v. Commercial Tax Officer reported in 1985 (5) ECC 259. Shri Prabhat Kumar, the learned JDR has referred to pages 71 and 74 of the paper book which are internal pages 2 and 5 of the order-in-original.

He has pleaded that prima facie the revenue has got a good case on merits and has pleaded for the rejection of the stay applications.

6. We have heard both the sides and have gone through the facts and circumstances of the case. The prima facie merits of the case are arguable. In para No.1 of this order we have given the details of the stay applications and appeals before us and also the details as to the signatories of the appeal memos and stay applications. The other three concerns are sister concerns of Central Cables Private Ltd. in para No.6 of the show cause notice it was duly mentioned, which appears on page 24 of the paper book. Para No. 6 from the show cause notice is reproduced below :- "6. Whereas it appears that in the guise of endorsing the GPIs by Noticee No. 1. in the name of Noticee No. 2. to 4 by suppression of material facts, by planning fraudulent modus operandi and thereby creating an impression that Noticees No. 1 to 4 are independent manufacturers and not the principal manufacturer and the job workers, all the noticees in collaboration with each other and by contravention of law and procedure evaded payment of duty and taken inadmissible MODVAT credit and as such proviso to Section 11-A for the extended period of 5 years is rightly applicable." On internal page 5 of the impugned order, the Collector has also observed that manufacturing was done by the job workers on account of Central Cables Pvt. Ltd. Relevant extract from para No. 3 on internal page 5 is reproduced below :- "5. Therefore, the procedures of Rule 57-F (2) read with Notification No. 214/86 dated 2-4-1986 was fully applicable in this case. Hence, there is no doubt at all that higher notional credit taken by M/s. Central Cables (P) Ltd., Nagpur under Rule 57-B was not permissible for such transaction because they were sending their own goods far job-workers and receiving them back and the ownership never changed hands. These modus operandi was undoubtedly intentional with the sole intention to evade payment of the correct amount of duty due to the Govt. Therefore, all the arguments put-forth by the parties concerned are neither satisfactory nor acceptable and the charges made in the show cause notice are fully established.

Let me examine whether the parties' contention that there was no suppression of facts etc., is at all correct. The modus operandi followed by M/s. Central Cables (P) Ltd., Nagpur as well as their job-workers is certainly fraudulent and dubious.

M/s. Central Cables (P) Ltd., Nagpur, the actual user, receives the quota of raw materials/inputs for the purpose of manufacture of finished products, i.e. wires/cables, were required to do that only and comply with all the provisions of Central Excise laws in this regard. But, however, taking the help of the instruction of endorsing the Gate Passes, they hatched a plan and worked out a modus operandi with sole intention to evade payment of duty. Not only they evaded the duty and availed undue small scale exemption, took undue excess credit, but also evaded various Central Excise rules and laws as charged in the show cause notice, intentionally for evasion of payment of correct amount of duty payable. Therefore, the provision to Section 11-A is fully applicable in this case, hence demand for extended period stands. Therefore, the party's argument in this regard is neither correct nor acceptable.

Therefore, it is established beyond doubt that all of them jointly and severally are liable to action as charged in the show cause notice." 7. Apparently, it also appears that the applicants have contravened the provisions of law. Since the matter is sub-judice, it will not be proper for us to give further observations on merits. Hon'ble Supreme Court in the case of Workmen of Associated Rubber Industry Ltd. v. Associated Rubber Industry Ltd. and Anr. reported in 1986 (157) ITR 77 had observed as under :-McDowell & Co. Ltd. v. Commercial Tax Officer (1985) 3 SCC 230; (1985) 154 ITR 148 (SC) at p. 161: "It is upto the court to take stock to determine the nature of the new and sophisticated legal devices to avoid tax and consider whether the situation created by the devices could be related to the existing legislation with the aid of emerging' techniques of interpretation as was done in Ramsay's case (1981) 2 WLR 449 ; (1982) AC 300, Burmah Oil (1982) Simon's Tax Cases 30 and Dawson's case (1984) 1 All ER 530; 2 WLR 226 (HL), to expose the devices for what they really are and to refuse to give judicial benediction." In that case, the court also had occasion to refer to the following observations of Lord Brightman in Funiss v. Dawson (1984) 1 All ER 530; 2 WLR 226, 239 (HL) (p.157 of 154 ITR): "The fact that the court accepted that each step in a transaction was a genuine step producing its intended legal result did not confine the court to considering each step in isolation for the purpose of assessing the fiscal results." Avoidance of welfare legislation is as common as avoidance of taxation and the approach in considering problems arising out of such avoidance

was necessarily to be the same.

If we now look at the facts of the case, what do we find A new company is created wholly owned by the principal company, with no assets of its own except those transferred to it by the principal company, with no business or income of its own except receiving dividends from shares transferred to it by the principal company and serving no purpose whatsoever except to reduce the gross profits of the principal company. These facts speak for themselves. There cannot be direct evidence that the second company was formed as a device to reduce the gross profits of the principal company for whatever purpose. An obvious purpose that is served and which stares one in the face is to reduce the amount to be paid by way of bonus to workmen. It is such an obvious device that no further evidence, direct or circumstantial, is necessary. It was argued that in 1971, the Aril Holdings Ltd. was wound up and amalgamated with the Associated Rubber Industry Ltd. and that this circumstance showed that the initial creation of Aril Holdings Ltd. was not a device of avoidance. But the learned counsel for the company was unable to explain why in the first instance Aril Holdings Ltd. was created and why later it was wound up. Probably, after Aril Holdings Ltd. was created, some unforeseen difficulties arose which have not been brought to light before us and it become necessary to wind it up and amalgamate it with the Associated Rubber Industry Ltd. We are, therefore, satisfied that the amount of dividend from INARCO Ltd. received by the Aril Holdings Ltd. should be taken into account in assessing the gross profit of the Associated Rubber Industry Ltd. for the purpose of calculation the rate of bonus payable to the workmen of the Associated Rubber Industry Ltd, The appeal is allowed with costs and it is declared that the workmen of the Associated Rubber Industry Ltd., Bhavnagar, are entitled to be paid bonus at the rate of 16% for the year 1969." 8. In view of these observations, we are of the view that prima facie merits of the case are arguable.

9. Now coming to the financial position of the applicants, we would like to observe that in the profit and loss account for the year ending 31st March, 1989 there is a net profit of Rs.. 32,29,527.81 and a sum of Rs. 9,27,,607..71 has been debited to the profit and loss account and the applicants have made a provision for taxation at Rs. 13,45,000.00. After recasting the profit and loss account, the net profit

works out at Rs. 55,02,135.52 (32,29,527.81 + 13,45,000.00 + 9,27,607.71). The applicants for the year in question were having sales to the tune of Rs. 6,58,69,127.53 and the value of the closing stocks at Rs. 45,02,709.74. The net profit in the previous year was Rs. 14,45,701.42 + provision for taxation Rs. 7,60,600.00 and depreciation Rs. 18,91,728.54 and after recasting the net profit works out at Rs. 40,98,029.96 and the sales were to the tune of Rs. 7,93,02,528.00. Cash and bank balances are to the tune of Rs. 34,33,380.46 and sundry debtors are to the tune of Rs. 1,53,82,646.22. The liquidity position of the applicants is very sound. Hon'ble Supreme Court in the case of Spencer & Co. Ltd. Madras v. Collector of Central Excise in application No. 332/84 in Appeal No. 693/84 had held as under : "We are in agreement with the contention of the counsel for the petitioner that the expression 'undue hardship' occurring in the proviso to Section 35F of the Central Excises and Salt Act, 1944, would include consideration, inter alia, of the aspect of liquidity possessed by the assessee. We are not inclined to take the view that the impugned order gives any indication that aspect has been completely ignored as was contended by counsel. With these observations, the special leave petition is dismissed." While disposing of the stay applications, this Court has also to look into the balance of convenience. In the matters before us, in view of the above observations, balance of convenience also is not in favour of the applicants. Hon'ble Supreme Court in the case of Assistant Collector of Central Excise, West Bengal v. Dunlop India Ltd., and Ors.

reported in 1985 (19) ELT 22 (SC) had observed as under :-In Titaghur Paper Mills Co. Ltd. v. State of Orissa, A.P. Sen, E.S. Venkataramiah and R.B. Misra, JJ held that where the statute itself provided the petitioners with an efficacious alternative remedy by way of an appeal to the Prescribed Authority, a second appeal to the Tribunal and thereafter to have the case stated to the High Court, it was not for the High Court to exercise its extraordinary jurisdiction under Article 226 of the Constitution ignoring as it were, the complete statutory machinery. That it has become necessary, even now, for us to repeat this admonition is indeed a matter of tragic concern to us. Article 226 is not meant to short-circuit or circumvent statutory procedures. It is only where statutory remedies are entirely ill-suited to meet the demands of extra-ordinary situations, as for instance where the very vires of the statute is in question or where private or public wrongs are so

inextricably mixed up and the prevention of public injury and the vindication of public justice require it that recourse may be had to Article 226 of the Constitution. But then the Court must have good and sufficient reason to by-pass the alternative remedy provided by statute. Surely matters involving the revenue where statutory remedies are available are not such matters. We can also take judicial notice of the fact that the vast majority of the petitions under Article 226 of the Constitution are filed solely for the purpose of obtaining interim orders and thereafter prolong the proceedings by one device or the other. The practice certainly needs to be strongly discouraged." 9A. In view of the above discussion, we are of the view that the applicants, M/s. Central Cables Pvt. Ltd. in stay application No.E/Stay/2098/90-B1 must deposit the full duty amount of Rs. 16,44,436.00 in cash within ten weeks from today. However, we feel that predeposit of the penalty amount of Rs. 1,50,000.00 will amount to undue hardship.

We dispense with the predeposit of the penalty amount of Rs. 1,50,000.00 and order that the applicants shall report compliance of this order to the Registry within twelve weeks from today. In case the applicants fail to comply with the terms of this order, stay order is likely to be vacated and the appeal is liable to be dismissed for non-compliance of provisions of Section 35F. The matter to come up for mention on 13th December, 1990. We further order that during the pendency of the appeal, the revenue authorities shall not pursue the recovery proceedings for the penalty amount of Rs. 1,50,000.00.

10. We have considered the applicants' contentions in stay applications No. E/Stay/2096/90-B1, E/Stay/2097/90-B1 and E/Stay/2099/90-B1 in the matters of Vid-harbha Cables, Omega Scientific Co. and Central Capacitors (P) Ltd. against whom a penalty of Rs. 25,000.00 each has been imposed. We accept the prayers of these three applicants and are of the view that the payment of penalties will amount to undue hardship. We dispense with the predeposit of the same and further order that during the pendency of the appeals, the revenue authorities shall not pursue the recovery proceedings. With these observations, the stay applications are disposed of accordingly.