FAX : 0532-2400149

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
38,MG Marg Civil Lines,Old Red Building,Allahabad-211001
Regional Branch, Allahabad

Dated: 09/11/2016

To

Appellant as per address in table below

Respondent as per address in table below

Final Order No. A/71041/2016-SM[BR] dated 04/11/2016

I am directed to transmit herewith a certified copy of order passed by the Tribunal under section 35-C(1) of the Central Excise and Salt Act, 1944.

Asstt. Registrar

| Application | Appeal | Name and Address of Appellant |
|---|---|---|
| 1 | E/432/2010 | KIRLOSKAR BATTERIES PVT. LTD. B-9, SITE-B, SURAJPUR, GREATER NOIDA-201306. |
| | | Name and Address of Respondent |
| 2 | | -C.C.E. NOIDA C-56/42, Sector-62, Noida-201307 |

Copy To

3 Advocate(s) / Consultant(s):

K. S. RAVI SHANKAR
NO. 152(18), RACE COURCE ROAD,
BANGALORE,
KARNATAKA
560001

4 Bar Association, CESTAT, Allahabad

5 Director Publications, Customs, Excise. I.P. Estate, Delhi

6 M/s Centax Publications Pvt. Ltd., 1512-B, Bhishm Pitamah Marg, New Delhi-3

7 Company Law Institute of India Pvt. Ltd., No.2 (old no.36), Vaithyaram Street, T. Nagar, Chennai-17

8 Taxmann Allied Service Pvt. Ltd., 59/32, New Rohtak Road, New Delhi-110005

9 LAWCRUX Advisors Pvt. Ltd., LAW House, 1-8, Sector-10, Faridabad 121003 (Haryana)

10 TaxIndiaOnline.com Pvt. Ltd., 2nd Floor, Vasant Arcade, Vasant Kunj, New Delhi - 110070
11 Mark Professional Services Pvt. Ltd., 108, Everest Block, Aditya Enclave, Hyderabad – 38
12 The ICFAI society, 52, Nagarjuna Hill,Punjagutta Hyderabad.-500082
13 M/S Knowledge Processing Pvt. ltd.(taxmanagementindia.com),FF-19,1st Floor,Cross River Mall,CBD Ground,Near Karkardooma Court,Delhi-110032
14 C.D.R. 15 Office Copy 16 Guard File

Asstt. Registrar

22-11-16

TRIBUNAL

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# IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

## REGIONAL BENCH : ALLAHABAD

## COURT No. 2

APPEAL No.E/432/2010-EX[SM]

(Arising out of Order-in-Appeal No. 298-CE/APPL/NOIDA/2009 dated 28/10/2009 passed by Commissioner of Central Excise & Customs (Appeals), Noida)

For approval and signature:

**Hon'ble Mr. Anil G. Shakkarwar, Member (Technical)**

| | | |
|---|---|---|
| 1. | Whether Press Reporter may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982? | No |
| 2. | Whether it would be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not? | Yes |
| 3. | Whether their Lordships wish to see the fair copy of the order? | Seen |
| 4. | Whether order is to be circulated to the Department Authorities? | Yes |

**M/s Kirloskar Batteries Private Limited** **Appellant**

Vs.

**Commissioner of Customs & Central Excise, Noida** **Respondent**

Appearance:

Shri Mohammad Rahim, Advocate, for Appellant

Shri Pawan Kumar Singh, Superintendent (AR), for Respondent

CORAM:

**Hon'ble Mr. Anil G. Shakkarwar, Member (Technical)**

Date of Hearing & Date of Decision : 04/11/2016

FINAL ORDER NO. 71041/2016

सीमा शुल्क उत्पाद एवं सेवा कर अपील अधिकरण CUSTOMS EXCISE & SERVICES TAX APPELLATE TRIBUNAL सत्यमेव जयते

**Per: Anil G. Shakkarwar**

The present appeal is filed by the appellant, M/s Kirloskar Batteries Private Limited, against Order-in-Appeal No. 298-CE/APPL/NOIDA/2009 dated 28/10/2009 passed by Commissioner of Central Excise & Customs (Appeals), Noida.

2. The brief facts of the case are that the appellant was issued with a Show Cause Notice dated 28/05/2008 wherein it was proposed to recover an amount of Rs.11,17,731/- which was equal to the amount of Cenvat credit availed in respect of capital goods cleared after use under invoice No. 01 dated 22/05/2007 to their another Unit at Banglore. The said Cenvat credit was availed during the period from 1997-98 and the capital goods were cleared in 2007 and the said Show Cause Notice invoked provisions Rule 3(5) of Cenvat Credit Rules, 2004 and proposal for recovery of said amount was under Rule 14 of Cenvat Credit Rules, 2004. The said Show Cause Notice was adjudicated through Order-in-Original No. 27/Additional Commissioner/Noida/2009 dated 16/04/2009. The appellant had submitted before the Original Authority that the said Rule 3(5) of Cenvat Credit Rules, 2004 deals with removal of capital goods as such and the capital goods were removed by them after use for several years and the same could not be treated as removed as such. They relied on various case laws to support their claim including in

the case of Cummins India Ltd. *Versus* Commissioner of Central Excise, Pune-III reported at 2007 (219) E.L.T. 911 (Tri. - Mumbai). The Original Authority did not appreciated the arguments and confirmed the demand of Rs. 11,17,731/- and imposed equal penalty. Aggrieved by the said Order-in-Original No. 27/Additional Commissioner/Noida/2009 dated 16/04/2009, appellant preferred appeal before Commissioner (Appeals). The said appeal was decided through Order-in-Appeal No. 298-CE/APPL/NOIDA/2009 dated 28/10/2009. The ld. Commissioner (Appeals) upheld the confirmation of demand by Original Authority and set aside the penalty imposed through Order-in-Original. Aggrieved by the order of Commissioner (Appeals) the appellant is before this Tribunal.

3. The ld. Counsel for the appellant has submitted that the capital goods were used in their Noida Unit for 10 years and after the use for 10 years they were removed to their another Unit at Banglore under invoice No. 1, dated 22/05/2007. It is very clearly stated in the invoice that the removal was stock transfer. He has further relied on ruling by Hon'ble High Court of Delhi in the case of Harsh International (Khaini) Pvt. Ltd. *Versus* Commissioner of Central Excise reported at 2012 (281) E.L.T. 714 (Delhi). Referring to the ruling in Para 13, 14 & 15 of the said ruling of Hon'ble High Court of Delhi, he has argued that the case is squarely covered by the case law and that the clearance of the said capital goods cannot be treated

as removed as such of capital goods and same is not covered by the said Rule 3(5) of Cenvat Credit Rules, 2004.

4. The ld. Departmental Revenue has supported the Order-in-Appeal.

5. Having considered the rival contentions, I find that the present appeal is covered by the said ruling of Hon'ble High Court of Delhi, relied upon by the ld. Counsel for the appellant. The Hon'ble High Court of Delhi, has ruled in the Para 13, 14 & 15 of case law as follows:-

> "13. M/s Harsh International Pvt. Ltd. admittedly sold the capital goods in June and July, 2007 to M/s Harsh International (Khaini) Pvt. Ltd. The dates of sale thus fall prior to the amendment made with effect from 13/11/2007. The Tribunal has rightly pointed out that the case of *Harsh International Pvt. Ltd.*, fall under Rule 3(5) as it stood amended from 06/05/2005 but before being amended on 13/11/2007. However, we note that the view taken by the Tribunal in the impugned order is that the words "as such" appearing in Rule 3(5) also took in the used capital goods. Thus according to the Tribunal, used capital goods when removed continued to remain capital goods "as such" and therefore the Cenvat credit availed of on the capital goods has to be repaid. Thus the substantial question of law raised in the appeal is whether used capital goods on which Cenvat credit was availed are capital goods removed "as such". The words

"as such" have been interpreted by the Punjab & Haryana High Court in Commissioner of Central Excise, Chandigarh *Versus* Raghav Alloys Ltd., 2011 (268) E.L.T. 161 (P & H) = 2012 (26) S.T.R. 87 (P & H) to refer to "unused" capital goods and do not take in the used capital goods. It has been observed as under:-

> "8. We have heard arguments of both the ld. Counsel. The Tribunal has rightly noted that unlike inputs, which get consumed 100% with the same are taken up for use in relation to manufacture of finished goods, capital goods are used over a period of time. The capital goods lose their identity as capital goods only when after use over a period of time, the same has become in-serviceable and fit to be scrapped. The object of Cenvat Credit on capital goods is to avoid the cascading effect of duty. If even after use for a couple of years, the Cenvat Credit is required to be reversed then it would certainly defeat the object of the scheme. To avoid misuse of the scheme in the Rules, it has been provided that if the machines are cleared as such the Assessee shall be liable to pay duty equal to amount of Cenvat Credit availed. The machines which are cleared after utilization cannot be treated as machines cleared as such. With effect from 13/11/2007, a proviso has been added to Rule 3(5) of the Cenvat Credit Rules providing that if the capital goods on which Cenvat Credit has been taken are removed after being used, the manufacturer shall pay the amount equal to Cenvat Credit taken on the said capital goods reduced by 2.5% for each quarter of

year or part thereof from the date of taking the Cenvat Credit. The board has also in the Circular dated 01/07/2002 clarified that in the case of clearance of goods after being put into use, the value shall be determined after allowing the benefit to depreciation as per rates fixed in Board's Letter dated 26/05/1993. The Respondent has utilized the machinery for nine years and paid duty on transaction value. The machine cleared after putting into use for nine years canot be treated as Cleared 'as such'. Insertion of proviso w.e.f. 13/11/2007 makes it clear that there is difference between machines cleared without putting into use and cleared after use. The Bombay High Court has upheld the view of the Tribunal in the case of *Cummins India Limited* Versus *Commissioner of Central Excise, Pune-III, 2007* (219) E.L.T. 911 (Tri. – Mumbai). The Tribunal in the case of *Nahar Fibres* has also dismissed Appeal of the Revenue and there is nothing to show that the said decision of the Tribunal has been set aside by any Court."

9. In these Circumstances, we are of the considered opinion that the Appeal of the Revenue is bereft of merits so deserves to be dismissed.

10. The question raised by Revenue are answered in favour of Assessee and Appeal is dismissed.

14. Our attention was drawn to the judgment of the Bombay High Court in the case of *Cummins India Limited* Versus *Commissioner of Central Excise, Pune-III*, dated

23/07/2008. The High Court has affirmed the order of CESTAT, holding that the view that used capital goods cannot be said to be capital goods removed "as such" for the purposes of Rule 3(5), "is in consonance with the law". This judgment of the Bombay High Court has been noticed by the Punjab & Haryana High Court in the above decision.

15. In the present case the appellant purchased the capital goods in the period between 2003 & 2005 and used them in its factory till they were sold to M/s Harsh International (Khaini) Pvt. Ltd. in June & July. Thus the capital goods were used for a period of 2 to 4 years. They cannot therefore be stated to be sold "as such" capital goods. They were sold as used capital goods. We agree with the Bombay and Punjab & Haryana High Courts and hold that the appellant was not liable to pay excise duty in accordance with Rule 3(5) when it removed the used capital goods and consigned them to M/s Harsh International (Khaini) Pvt. Ltd."

Following the ruling by Hon'ble High of Delhi in the above stated case law, I hold that the appellant was not required to pay excise duty that is in another words debit of Cenvat credit taken at the time of receipt of said capital goods under Rule 3(5) of Cenvat Credit Rules, 2004 while removing the said capital goods after use. Therefore, I set aside the

Order-in-Appeal and allow the appeal. The appellant shall be entitled for consequential relief, in accordance with law.

(Dictated and pronounced in Court)

Sd/-
(ANIL G. SHAKKARWAR)
MEMBER (TECHNICAL)

*Ansari*