CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH
BANGALORE

Appeal(s) Involved:

E/20229/2018-SM, E/20233/2018-SM, E/20235/2018-SM

[Arising out of No. COC-EXCUS-000-APP-166 to168-2017 dated 28/07/2017 passed by Commissioner of Central Tax , COCHIN(Appeal)]

M/s. Philips Carbon Black Ltd
Cochin Unit Karimugal Brahmapuram PO
KOCHI - 682303
KERALA

Appellant(s)

Versus

Commissioner Of Central Tax & Central Excise, Cochin
C.R. Buildings, I.S Press Road
Cochin – 682 018.
Kerala

Respondent(s)

Appearance:

Mr. Kuriyan Thomas, Advocate
MENON & PAI
IS PRESS ROAD, COCHIN
KOCHI
KERALA
682018

For the Appellant

Mr. Parasivamurthy, AR

For the Respondent

Date of Hearing: 06/04/2018
Date of Decision: 11/04/2018

CORAM:

HON'BLE SHRI S.S GARG, JUDICIAL MEMBER

Final Order No. 20551-20553 /2018

Per : S.S GARG

The appellants have filed these three appeals against the common impugned order dated 28.7.2017 passed by the

Commissioner (A). Since the issue involved in all these three appeals is identical, therefore, all the appeals are being disposed of by this common order. The details of all the appeals are given below:

Sl. No.	Appeal No.	OIO No./Date	Period of Dispute	Service Tax & Cesses	Interest and Penalty
1	E/20229/2018	No.21/2012-CE dt.27.12.2012	2007-08 to 2011-2012	Rs.14,24,968/-	Interest u/s 11AA & Penalty of Rs.5000/- u/r 25 of CER, 2002
2	E/20233/2018	-do-	-do-	Rs.14,24,968/-	Interest u/s 11AA & Penalty of Rs.7,12,484/- u/r 25 of CER, 2002
3	E/20235/2018	No.145/2013-CE dt.28.6.2013	April – December 2012	Rs.4,94,975/-	Interest u/s 11AA & Penalty of Rs.2,47,488/- u/r 25 of CER, 2002

2. Briefly the facts of the present case are that the appellants are engaged in the manufacture of carbon black falling under Chapter 28 of Central Excise Tariff Act, 1985. Department issued a show-cause notice demanding duty on the old dismantled plants and machinery cleared as scrap during 2007-08 to 2011-2012 and also from 1.4.2012 to 13.12.2012. The proposal was to demand duty of Rs.14,24,968/- and Rs.4,94,975/- on the capital goods sold as scrap. Appellant filed

reply to the show-cause notice pointing out that the machinery was dismantled as per the direction of the Kerala Pollution Control Board and the scrap was generated from dismantling all the used capital goods which was removed during the period from July 2007 to March 2012. The appellant also submitted that the plant removed was set up in the year 1984 i.e., before the introduction of CENVAT/MODVAT Credit on capital goods and no MODVAT credit was availed on these capital goods. After following due process, the Original Authority confirmed the demand in the show-cause notice vide Order-in-Original dated 27.12.2012 and also vide Order-in-Original dated 28.6.2013. Aggrieved by the said orders, appellant filed appeals before the Commissioner (A) and the Department also filed appeal against the Order-in-Original challenging the quantum of penalty imposed by the Additional Commissioner and all the three appeals were disposed of by the Commissioner (A) vide the impugned order whereby the Commissioner (A) has rejected the appeal of the assessee and allowed the appeal of the department and enhanced the penalty from Rs.5,000/- to Rs.7,12,484/- and Rs.2,47,488/-. Hence, the present appeals.

3. Heard both the parties and perused the records.

4. Learned counsel for the appellant submitted that the impugned order is not sustainable in law as the same has been passed without considering the facts and the law in proper perspective. He further submitted that the show-causes and the Orders-in-Original do not prove or even allege that the appellant has availed CENVAT credit on plant and machinery, which was removed and scrapped. He further submitted that there is no availment of CENVAT/MODVAT credit on the plant and therefore, there is no requirement under the CENVAT Credit Rules to pay duty at the time of removal of the same. He further submitted that this issue is no more *res integra* and has been decided in favour of the assessee by catena of judgments rendered by this Tribunal and the High Court. In support of this, he relied upon the following decisions.

- *Mangalam Cement Ltd. vs. CCE: 2016 (338) ELT 145 (Tri.-Del.)*
- *Insulators & Electricals Co. vs. CCE: 2013 (290) ELT 404 (Tri.-Del.)*
- *Nagpur Power Industries Ltd. vs. CCE: 2017 (346) ELT 315 (Tri.-Mum.)*
- *Pepsico India Holdings (P) Ltd. vs. CCE: 2016 (343) ELT 645 (Tri.-Del.)*
- *CCE, Chandigarh vs. Winsome Textile Industries Ltd.: 2017 (358) ELT 387 (Tri.-Chand.)*

- *Grasim Industries Ltd. vs. UOI: 2011 (273) ELT 10 (SC)*

5. On the other hand, the learned AR defended the impugned order.

6. After considering the submissions of both the parties and perusal of the material on record and the various decisions relied upon by the appellant, I find that it is an admitted fact that the capital goods were procured prior to the introduction of MODVAT credit on capital goods and therefore, no credit was availed on the same at the time of procurement. The payment of duty on capital goods removed as such or removed as scrap, with reference to Rule 3 of CENVAT Credit Rules, 2004 arises only in a case where the assessee had availed credit on the capital goods which are removed from the factory. Further, I find in the present case, the adjudicating authority even after accepting that no CENVAT credit was availed on the subject capital goods confirmed the duty without any proper reason as to how duty can be demanded on removal of capital goods on which no CENVAT credit is claimed at the time of receipt at the factory. Further, I find that the decision in the case of **GFNC Ltd. vs. UOI** reported in **2007 (214) ELT A23** relied upon by the Commissioner (A) is

not applicable in the facts and circumstances of this case because the issue involved in that case was with reference to the classification of capital goods sold as scrap and the said decision does not lay down any principle to the effect that duty is payable on removal of capital goods even though CENVAT credit is not availed on the said capital goods. Further, I find that in the case of ***UOI vs. Hindustan Zinc Ltd.: 2008 (225) ELT 50*** wherein it is clearly held that if the capital goods which are not the one subjected to availing of MODVAT credit by the manufacturer, no duty is payable on removal of its waste and scrap from its factory. By following the ratio of the above said decision, which is clearly in favour of the assessee, I am of the view that the impugned order is not sustainable in law and therefore, the same is set aside by allowing all the three appeals of the appellant.

(Order was pronounced in Open Court on **11/04/2018.)**

S.S GARG
JUDICIAL MEMBER

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