

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
CHANDIGARH

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REGIONAL BENCH – COURT NO. 1

**Excise Appeal No. 1298 Of 2012**

[Arising out of OIO No. 111-CE/PKJ/CCE/AdJ/2012 dated 15.03.2012 passed by the Commissioner of Central Excise, New Delhi]

**M/s GKN Driveline (India) Ltd.**

**: Appellant (s)**

Plot No. 34-35, Industrial Area, Dharuhera, Rewari

Vs

**CCE, Delhi-III**

**: Respondent (s)**

Udyog Minar, Vanijya Nikunj, Udyog Vihar  
Phase-V, Gurgaon (Haryana)

APPEARANCE:

Ms. Krati Singh, Ms. Shreya Khunteta, Advocates for the Appellant  
Ms. Narender Singh, Authorised Representative for the Respondent

**CORAM : HON'BLE Mr. S. S. GARG, MEMBER (JUDICIAL)**  
**HON'BLE Mr. P. ANJANI KUMAR, MEMBER (TECHNICAL)**

**ORDER No. A/60318/2023**

Date of Hearing:02.05.2023

Date of Decision:30.08.2023

**Per : S. S. GARG**

The present appeal is directed against the impugned order dated 15.03.2012 passed by the Commissioner of Central Excise, New Delhi whereby he has confirmed the demand of Rs. 58,55,479/- under Rule 3(5B) of the Cenvat Credit Rules, 2004 with equal amount of penalty under Rule 15 of the Cenvat Credit Rules, 2004 read with Section 11AC of the Central Excise Act, 1944.

2. Briefly the facts of the present case are that the appellant is engaged in the manufacture of motor vehicles and was discharging excise duty on their final products. The appellant is also availing Cenvat Credit of the excise duty paid on the inputs and capital goods

as per the provisions of Cenvat Credit Rules, 2004. The appellant supplies these motor vehicle parts to various automobile manufacturers like Maruti Udyog, Hyundai Motors, etc. for manufacture of motor vehicles as well as spare parts for after sale service. In automobile industry, it is a normal commercial practice that to increase the market share and to attract the consumers, the vehicle manufacturers introduce new models/make changes in the models of the vehicles to meet the requirement of the consumers. After the introduction of new models of the vehicle, the demand of parts of old vehicle decreases. However, in terms of pre-entered contracts with such motor vehicle manufacturers, the appellant is duty bound to supply the motor vehicle parts of discontinued models for the next ten years in order to meet the spare part requirement of the vehicles already running on the road. Due to this reason, the appellant is required to hold the inventory of input for next ten years. The said inventory retained by the appellant is in a good and usable condition but the same moves at a very slow pace. While the inventory is physically with the appellant and can be used, the appellant makes a provision for slow moving inventory in the financial records as a conservative accounting policy. The appellant makes provision for writing off 100% of the total value of stock of direct materials in excess of the estimated future demand for the next 12 months. On any subsequent creation of fresh demand of stock whose value was written off, the provision is released by the appellant.

3. During audit of the factory premises of the appellant, the department was of the view that the appellant is required to reverse

Cenvat Credit availed on inputs which were written off as per Rule 3(5B) of the Credit Rules.

4. Accordingly, a show cause notice dated 16.03.2010 was issued to the Appellant proposing demand of Cenvat Credit of Rs. 98,74,704/- on the inputs whose value was written off during the period of January, 2006 to December 2009.

5. After following due process, the Ld. Commissioner vide the impugned order dropped the demand for the period from January 2006 to 10.05.2007 as Rule 3(5B) which was inserted with effect from 11.05.07. Further, the Ld. Commissioner also dropped the demand of credit pertaining to the inputs which were not written off fully. The Ld. Commissioner confirmed the demand of Rs. 58,55,479/- under Rule 3(5B) along with interest and equal penalty under Rule 15 of the Credit Rules.

6. Hence, the present appeal.

7. Heard both the parties and perused the records.

8. Ld. Counsel for the appellant submitted that the impugned order is not sustainable in law as the same has been passed without properly appreciating the legal provisions and the binding judicial precedents on the same issue. She further submitted that during the relevant period, there was no recovery mechanism under Rule 3(5B) of the Cenvat Credit Rules and vide Notification No. 3/2013 dated 01.03.2013, the following explanation was inserted in Rule 3, after the proviso to Rule 3(5B):-

"Explanation. If the manufacturer of goods or the provider of output service - fails to pay the amount payable under sub-rules (5), (5A), and (5B), it shall be recovered, in the manner as provided in rule 14, for recovery of CENVAT credit wrongly taken."

She further submitted that this explanation providing for recovery of the amount under Rule 3(5B) as per Rule 14 was made applicable only with effect from 01.03.2013, it is clear that there was no provision for recovery of the amount under Rule 3(5B) during the relevant period. Hence, she has prayed that the impugned order is liable to be set aside only on this ground alone. For this submission, she relied upon the following judgements:-

- Ericsson India Pvt. Ltd. v. CCE 2019 (3) TMI 776-CESTAT New Delhi
- Steel Authority of India Ltd. v. CCE 2020 (3) TMI 147-CESTAT Chennai
- Udaipur Cement Works Ltd. v. CGST 2019 (11) TMI 610-CESTAT Chennai
- Heidelberg Cement India Ltd. v. CCE 2017 (11) TMI 1394-CESTAT Bangalore
- Hindustan Motors Ltd. v. CCE 2019 (7) TMI 1168-CESTAT Chennai

9. She further submitted that in terms of Rule 3(5B) of the Credit Rules, the appellant was required to reverse credit attributable to slow moving items in respect of which provision for writing off 100% value was created by the appellant. However, in terms of the proviso to Rule 3(5B) itself, if the said goods are used subsequently, the appellant was entitled to take credit of the amount equivalent to the Cenvat Credit paid earlier. She further submitted that when the slow moving items were used, the provision created for writing off their value was released in their books of accounts. During the relevant period, the appellant has released a provision of Rs. 2,53,92,631/- in respect of items whose value was written off/provision was made in

their accounts after 11.05.2007. Hence, the appellant was not required to reverse the Cenvat Credit pertaining to inputs in whose relation the provision was released. For this submission, she relied upon the following decisions:-

- BCH Electric Ltd. v. Commissioner of Central Excise 2016 (344) ELT 469 (Tri.-Chan.)
- Padmini VNA Mechatronics (P) Ltd. v. CCE 2016 (1) TMI 730-CESTAT New Delhi

She also submitted that the appellant was required to reverse only an amount of Rs. 16,70,774/- which was already reversed by the appellant on 01.05.2010 and the same was appropriated in the impugned order also.

10. Further, the appellant reversed the remaining Cenvat Credit of Rs. 41,84,705/- on 31.01.2012 and also simultaneously took the credit back in their books on the same date and this was also submitted before the Ld. Commissioner vide submissions dated 07.02.2012. She also submitted that the demand prior to March, 2009 is time barred as the show cause notice was issued by invoking the extended period of limitation in absence of any element of mala fide and suppression of facts on the part of the appellant. As per the Ld. Counsel, the demand pertaining to normal period of limitation i.e. from March, 2009 to December, 2009 comes only Rs. 2,17,251/-. She further submitted that the entire demand is based on entries reflected in the financial books/Balance Sheet of the appellant and hence, the extended period of limitation cannot be invoked. For this submission, she relied upon the following decisions:-

- Hindalco Industries Ltd. v. CCE 2003 (161) ELT 346 (Tri.-Del.)

- Commissioner of Central Tax v. ABB Limited 2022 (6) TMI 1212-Karnataka

She further submitted that regular audits were being undertaken by the department and hence, the extended period of limitation cannot be invoked. She also submitted that the interest cannot be demanded to the extent the Cenvat Credit was not utilised. For this submission, she relied upon the decision of the Hon'ble Jurisdictional High Court of Punjab and Haryana in the case of CCE v. Grasim Bhiwani Textile Ltd. 2018 (362) ELT 424 (P&H). She also submitted that during the relevant period, neither the recovery provision nor the penalty provisions were borrowed for recovery of an amount under Rule 3(5B) which was inserted w.e.f. 01.03.2013.

11. On the other hand, the Ld. DR reiterated the findings in the impugned order and submitted that the explanation added in proviso to Rule 3(5B) w.e.f. 01.03.2013 is retrospective as the same was in the form of clarification which is applicable from retrospective date. In support of this submission, he relied upon the following decisions:-

- 2006 (206) E.L.T. 897 (Tri. - Bang.)- MALLIKA SAREE PROCESSING
- 2009(234) ELT.545- IEE ENGG. ENTERPRISERS PVT. LTD.
- Commissioner vs. IEE Engineering Enterprises Pvt. Ltd. - 2017 (353) E.L.T. A31 (Mad.)]
- 2018 (361) E.L.T. 561 (P & H) - ASIANLAK HEALTH FOODS LTD.
- 2022 (66) G.S.T.L. 264 (Cal.)- HIMADRI SPECIALITY CHEMICAL LTD.

- 2018 (364) E.L.T. 827 (Tri. - Chennai) - ALSTOM PROJECTS INDIA LTD.
- 2015 (319) E.L.T. 129 (Tri. - Mumbai) -CONCEPT PHARMACEUTICALS LTD.

Ld. DR also submitted that the decision in the case of Ericsson India Pvt. Ltd. cited (supra), the department has filed appeal before the Hon'ble High Court of Rajasthan in which the Hon'ble High Court has issued notice to the respondent and the matter is **subjudice** before the Hon'ble High Court.

12. After considering the submissions of both the parties and perusal of material on record, we find that the appellant as per the normal commercial practice in the automobile industry has made a provision for writing off the cenvat credit on inputs as per Rule 3(5B) of the Cenvat Credit Rules, 2004. During the audit, the department was of the view that the appellant is required to reverse Cenvat Credit availed on inputs which were written off as per Rule 3(5B) of the Cenvat Credit Rules.

13. Further, we find that during the relevant period, there was no recovery mechanism under Rule 3(5B) of the Cenvat Credit Rules and the explanation which was introduced vide Notification No. 3/2013 dated 01.03.2013 was from 01.03.2013 vide which it was provided that if the manufacturer of goods or the provider of output service fails to pay the amount payable under sub-rules (5), (5A), and (5B), it shall be recovered, in the manner as provided in rule 14, for recovery of CENVAT credit wrongly taken. This recovery mechanism introduced from 01.03.2013 cannot be made applicable from the retrospective date and it can be only prospective and this issue was considered in

various decisions cited (supra) by the Tribunal wherein it was held that when there was no recovery mechanism before 01.03.2013, therefore, no recovery can be affected and accordingly the present proceedings initiated under Rule 14 of Cenvat Credit Rules read with Rule 3(5B) of the Cenvat Credit Rules is liable to be dropped.

14. It is pertinent to note that the identical issue was considered by the Division Bench of the Tribunal in the case of Ericsson India Pvt. Ltd. cited (supra) wherein the Tribunal has held as under:-

“7. Having considered the rival contentions, we find that the issue is one of interpretation. We further find that for reversal of cenvat credit on partial writing down of value of inputs, the provision was introduced only first time by amendment of Rule 3(5B) of Cenvat Credit Rules, with effect from 01.03.2011. Further, there was no provision prior to 01 March 2013 for recovery of cenvat credit and interest thereon under Rule 3(5B) etc. which was made applicable with effect from 01.3.2013 only, by virtue of Notification No. 3 of 2013-CE(NT) dated 01.03.2013. The notification provides that if the manufacturer of goods or the provider of output service fails to pay the amount payable under sub-rule (5), (5A) and (5B), it shall be recovered, in the manner as provided in Rule 14, for recovery of CENVAT credit wrongly taken.

8. Learned Counsel have also pressed the ground that as they were not required to reverse the cenvat credit on partial writing down the value of inputs, prior to 01.03.2011, accordingly, we hold that as there was no such legal requirement. The learned Counsel also prays that they are entitled to refund, already reversed credit on account of partial writing down of value, prior to 01.03.2013.

9. In this view of the matter, we hold that the issue has arisen due to change of opinion on the part of the Revenue, but there is no suppression of facts on the part of the appellants. Further, we find that no amount was due to be reversed under rule 3(5B) on the date of issue of show cause notice. Accordingly, we hold that larger period for limitation cannot be invoked and no show cause notice was required to be issued. Accordingly, we hold that impugned order is not sustainable, and is set aside. Appeal is allowed with consequential relief. In this view of the matter, we set aside the demand, penalty and interest”

Though the Revenue has filed appeal against the decision before the Hon'ble High Court of Rajasthan, but no stay has been granted by the Hon'ble High Court.

15. Further, we also find that in terms of proviso to Rule 3(5B) itself if the said goods are used subsequently the appellant was entitled to take credit of the amount equivalent to the cenvat credit paid earlier. Further, we find that the entire demand is based on the entries reflected in the financial books of accounts and the balance sheet of the appellant, and there has not been any suppression and malafide on the part of the appellant, and therefore, the demand pertaining to extended period of limitation is not sustainable and the demand pertaining to normal period of limitation comes to only Rs. 2,17,251/-.

16. Further, we find that when during the relevant period, there was no recovery mechanism provided in the Cenvat Credit Rules, therefore, the entire demand is liable to set-aside and we do so.

17. In view of above, the appeal of the appellant is accordingly allowed with consequential relief, if any, as per law.

*(Pronounced on 30.08.2023)*

**(S. S. GARG)**  
MEMBER (JUDICIAL)

**(P. ANJANI KUMAR)**  
MEMBER (TECHNICAL)

G.Y.