

**IN THE CUSTOMS, EXCISE AND SERVICE TAX
APPELLATE TRIBUNAL
SOUTH ZONAL BENCH AT CHENNAI
[COURT : Single Member 3 B3]**

Appeal No.: E/00322/2012

[Arising out of Order-in-Appeal No. 37/2012 dated
10.02.2012 passed by the Commissioner of Central Excise
& Service Tax (Appeals), Coimbatore.]

M/s. Flowserve India Controls Pvt. Ltd., : **Appellant**
SF No. 136/3,
137, Myleripalayam Road,
Othakalmandapam,
Coimbatore – 641 021

Versus

The Commissioner of G.S.T. & Central Excise, : **Respondent**
Coimbatore Commissionerate

Appearance:-

Shri. Vinayaka, Consultant
for the Appellant
Shri. L. Nandakumar, AC (AR)
for the Respondent

CORAM:

Hon'ble Shri P. Dinesha, Member (Judicial)

Date of Hearing: 19.11.2018

Date of Pronouncement: **10.12.2018**

Final Order No. **43063 / 2018**

This appeal is filed by the assessee against the Order-in-Appeal No. 37/2012 dated 10.02.2012 passed by the Commissioner of Central Excise & Service Tax (Appeals), Coimbatore and the only issue involved is whether the provisions of amended Rule

3(5B) of the CENVAT Credit Rules (CCR), 2004 are applicable, requiring the reversal in respect of the provisions made on account of non-cenvatable, non/slow moving goods.

2.1 The appellant manufactures Pump and Parts thereof, classifiable under CETH 8413 7091, 8413 7092, 8413 8099 and 8413 9120. It is the case of the appellant that it purchases various inputs locally and also imports from outside against which it avails appropriate CENVAT Credit; the appellant generally makes a provision in its Books of Account in respect of slow-moving or non-moving materials. During the Audit, the Revenue appears to have noticed in the balance-sheet a provision for Rs. 1,89,11,146/- towards slow and non-moving items and that the Revenue demanded the reversal of Credit on the above, to an extent of Rs. 31,16,563/- citing the amended provisions of Rule 3(5B) *ibid*.

2.2 A Show Cause Notice was issued on the above lines demanding CENVAT Credit on the provisions made along with applicable interest and penalty and thereafter, vide Order-in-Original No. 06/2011 (ADC) dated 22.02.2011, the proposals in the above Show Cause Notice came to be confirmed. The first appellate authority having concurred with the findings as well as

demand raised by the adjudicating authority vide impugned Order, the appellant has assailed the same in this appeal.

3. Today when the matter came up for hearing, Ld. Consultant Shri. Vinayaka appeared on behalf of the assessee and Ld. AC (AR) Shri. L. Nandakumar appeared on behalf of the Revenue.

4. I have considered the rival contentions, perused the materials placed on record and have also gone through the judgements relied on during the course of arguments.

5.1 I find from the records that the appellant has replied to the Show Cause Notice contending that Rule 3(5B) *ibid* which was introduced with effect from 11.05.2007 was prospective in nature; that out of the total provisions made, Rs. 1,17,61,774/- pertained to the opening balance as on 01.04.2007, etc; and that therefore, the CENVAT Credit reversed on the opening balance of Rs. 26,22,215/- was required to be refunded.

5.2 During the course of hearing today, Ld. Consultant submitted that even with regard to the provision made towards loss on customer order (of Rs. 7,52,018/-) was supported with documentary evidences like the list of orders and factory order entry reflecting the value of order. Hence, he submitted that the recognition of income as well as the provision made in the books

was only a book entry which had nothing to do with provision made for the slow or non-moving goods and that consequently, credit on the same need not be reversed. He also contended that even if for the sake of arguments Rule 3(5B) is considered, then the same applies only when credit is availed on inputs and input becomes obsolete before being put to use; that provision for such input is made in the books and such input is not removed from the factory, whereas, in the appellant's case, no CENVAT Credit was availed as the items were procured from small scale vendors/traders which did not involve CENVAT duty.

6. *Per contra*, Ld. AR supported the findings of the lower authorities. He also submitted that Rule 3(5B) mandates that when any provision is made in the Books of Account to write-off, then the manufacturer shall pay an amount equivalent to the CENVAT Credit availed in respect of such inputs or capital goods. He further submitted that when a provision to write-off is made in the Books of Account without actually removing the same, the date of notification becomes irrelevant to the reversal of Credit and thus submitted that the findings of the lower authorities are to be sustained.

7.1 The dispute relates to the period from 2007-08 to 2008-09. I find that the Hon'ble High Court of Bombay in the case of *Commissioner of Central Excise Vs. M/s. Hindalco Industries Ltd. – 2011 (272) E.L.T. 161 (Mum.)* has considered a somewhat similar issue and has arrived at the following conclusion :

“5. The period involved in the present Appeal is prior to the insertion of sub-rules (5B) and (5C) in Rule 3.

6. In Commissioner of Central Excise v. Indian Petrochemicals Corporation Limited, [2008 \(226\) E.L.T. 339](#) a Division Bench of this Court had noted that the Tribunal in a long line of judgments had taken the view that where the goods have been shown as written off goods, the benefit is available. In the present case, as already noted earlier, the period to which the dispute relates is prior to the insertion of sub-rules (5B) and (5C) in Rule 3. The Tribunal held that the case of the assessee was covered by several of its judgments which have been adverted to in para 11 of the judgment. Counsel appearing on behalf of the Revenue has not submitted before the Court that any of those judgments have been overruled by any decision of this Court or of the Supreme Court. This case relates to a period prior to the amendment of Rule 3 by the insertion of sub-rules (5B) and (5C). In that view of the matter and for the reasons already noted, the Appeal would not raise any substantial question of law and shall accordingly stand dismissed. There shall be no order as to costs. ”

7.2 Similarly, the Delhi Bench of the Tribunal in the case of *M/s. Sakata Inx (India) Ltd. Vs. C.C.E., Jaipur – 2009 (240) E.L.T. 225 (Tri. – Del.)* has considered a somewhat similar issue and after considering the rival contentions, has held as under :

“ 3. I have carefully considered the submissions from both the sides. I find that neither in the Order-in-Original nor in the impugned Order-in-Appeal, there is any finding that the inputs, in question, have been scraped and discarded from the inventory. On the contrary that the Appellant submits at the time of personal hearing before the adjudicating authority and before the Commissioner (Appeals) detailed chart showing the consumption of the inputs including the slow moving inputs had been submitted in support of

their claim that the slow moving inputs, in respect of which Cenvat credit is sought to be denied, are being used. The inputs in respect of which the credit is sought to be denied are still being used and are very much in the stock. Just because a provision was made in the books of accounts for 2003-04 for non-moving/slow moving/obsolete items of inputs, it cannot be concluded that those items have been actually scraped and discarded from the inventory. In view of the facts of this fact, the Tribunal's judgment in the case of BHEL v. CCE, Bangalore (supra) is squarely applicable. The impugned order, therefore, is not sustainable and the same is set aside. The appeal is allowed with consequential relief."

7.3 So also, the Bangalore Bench of the Tribunal in the case of

M/s. B.H.P.V. Ltd. Vs. C.C.E. – 2009 (240) E.L.T. 49 (Tri. – Bang.)

dealing with a similar issue, has held as under :

" 5. The learned Departmental Representative referred to the Board's circular dated 16-7-2002 para 3 and also our attention was invited to the amendment in the Cenvat Credit Rules by way of Notification 26/2007, dated 11-5-2007 wherein it is stated '5B'. "If the value of any, (i) input, or (ii) capital goods before being put to use, on which Cenvat credit has been taken is written off fully or any provision to write off fully has been made in the books of account, then the manufacturer shall pay an amount equivalent to the Cenvat credit taken in respect of the said input or capital goods. Provided that if the said input or capital goods is subsequently used in the manufacture of final products, the manufacturer shall be entitled to take credit of the amount equivalent to Cenvat credit paid earlier subject to the other provisions of these rules."

6. On a very careful consideration of the issue, we find that the inputs/spares in this case had not at all been removed from the factory. Our attention was also invited to two decisions. Wherein the same issue was examined by this Tribunal and decision was given in favour of the party in the case of Bharat Heavy Electricals Ltd. v. Commissioner of Central Excise, Bangalore - 2002 (50) RLT 208 (Tri.-Bang.) and in the case of M/s. Hindustan Zinc Ltd. v. Commissioner of Central Excise, Visakhapatnam - [2005 \(191\) E.L.T. 724](#) (Tri.-Bang.) wherein it has been held that the Modvat Credit need not be reversed even though 75% of the value is written off. In the present case the spares/inputs are still available in the factory. There is no finding that they have been deteriorated and they would not be put to any use at all. The values only have been written off for the purpose of balance sheet. Even the amendment to Cenvat Credit Rules came later in 2007. All these present disputes pertain to a period prior to the amendment of the Cenvat Credit Rules. This Bench also has earlier given a decision in the party's favour. Only when there is evidence that the input/spares have been destroyed or would not be capable of using it, the Modvat credit taken should

be reversed. In other words, so long as the inputs are capable of being used and when they were available in the factory, there is no justification in demanding the reversal of credit and there is no justification also for imposing such a high penalty on the appellants. In these circumstances, the impugned order is not justified. We set aside the same and allow the appeal with consequential relief."

8. The only possible conclusion, in the light of the interpretations drawn by the courts in the above decisions, is that the applicability of Rule 3(5B) is prospective. Consequently, there can be no demand of reversal of Credit on the opening balance (Rs. 1,17,61,774/- as on 01.04.2007).

9. The Show Cause Notice incorporates the reply filed by the assessee, taking note of the Additional provisions made for the period 2008-09 and 2009-10 up to August 2009 which are invariably hit by the provisions of Rule 3(5B) and therefore, the Credit availed, if any, is required to be reversed. This aspect alone is therefore remanded to the file of the adjudicating authority to verify and demand appropriate reversals, if any, for the latter two periods alone.

10. The appeal is partly allowed and partly remanded on the above terms.

(Pronounced in open court on 10.12.2018)

Sdd

(P. Dinesha)
Member (Judicial)