**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL**
**SOUTH ZONAL BENCH**
**CHENNAI**

**Appeal No.E/448/2011**

[Arising out of Order-in-Original No.3/2011 dt. 30.06.2011 passed by Commissioner of Central Excise, Coimbatore]

Thiagarajar Mills Ltd., Unit-II — Appellant

Versus

Commissioner of Central Excise, Coimbatore — Respondent

Appearance :

Shri G. Natarajan, Advocate
For the Appellant

Shri A. Cletus, ADC (AR)
For the Respondent

**CORAM :**

**Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)**
**Hon'ble Shri P. Dinesha, Member (Judicial)**

**Date of hearing : 09.01.2019**
**Date of Pronouncement:13.03.2019**

**FINAL ORDER No. 40470 / 2019**

**Per Madhu Mohan Damodhar**

The facts of the case are that appellants were engaged in manufacture of cotton yarn. They had availed cenvat credit on inputs as well as capital goods and cleared their goods on payment of duty. From 1.8.2006, they started availing exemption from payment of duty on final products in terms of Notification NO.30/2004 dt. 9.7.2004. Pursuant to audit, it emerged that appellants had removed cenvat availed capital goods “as such” to their other units from June 2006 to December 2007, under invoice / delivery challan, without discharging the amount equal to the credit availed in respect of such capital goods as envisaged in Rule 3 (5) of the Cenvat Credit Rules, 2004. Hence a show cause notice dt. 25.08.2009 was issued to the appellants proposing demand of an amount of Rs.1,04,35,038/- being cenvat credit originally availed on the capital goods cleared from their factory for contravention of provisions of Rule 3 (5) of CCR 2004. Notice also proposed imposition of interest liability and penalties under various provisions of law. In adjudication, vide the impugned order dt. 30.06.2011 the adjudicating authority upheld the allegation in the SCN and demanded tax liability of R.1,01,03,808/- with interest thereon and also imposed equal penalty under Rule 15 (2) of CCR 2004 read with Section 11AC of the Central Excise Act, 1944. Hence this appeal.

2. When the matter came up for hearing on 9.1.2019, on behalf of the appellants, Ld. Advocate Shri G. Natarajan made oral and written submissions which can be broadly summarized as under :

i) Once the appellant opted for availing exemption for their final products, in the absence of any other provisions under the CCR, the only consequence is that the balance of credit shall lapse.

ii) By quantifying the credit attributable to inputs and reversing the same and by allowing the balance credit to lapse, the appellant has complied with the above.

iii) Once the appellant opted to avail exemption, they are out of the excise net and for the clearances of cenvat credit availed capital goods, after coming out of excise net they are not at all required to pay any amount.

iv) The provisions of Rule 3 (5) of the CCR 2004 are applicable ony so longer a person is governed by the provisions of CCR 2004. Once the credit availed on capital goods is utilized and the balance credit has also lapsed and the person has opted to avail exemption thereafter and in the absence of any requirement for reversal of credit availed on capital goods in such scenario, the subject demands are without the authority of law.

v) Without prejudice to the above, demand of the entire credit availed by the appellant is not proper and the reversal has to be quantified after allowing 2.5% credit for every quarter of use. Reliance is placed on various case laws, including that of the Hon'ble Madras High Court in *CCE Salem Vs Rogini Mills Ltd.* - 2011 (264) ELT 367 (Mad.) While demanding the same, the credit reversed by the appellant for the inputs lying stock (which was not required during the relevant time as Rule 11 (3) came into force only from 1.3.2007 and the lapsed credit, shall be adjusted against the demand.

vi) The demand is also hit by time bar.

vii) For an earlier period in the appellant's own case during the period February 2006 to June 2006 in respect of the same dispute, the Tribunal vide Final Order No.40256-40257/2014 dt. 28.03.2014 inter alia had remanded the matter to the adjudicating authority to decide the matter afresh after considering the decision of the Larger Bench in the case of *CCE vs. Navodhaya Plastic Industries Ltd.* – 2013-TIOL-1773-CESTAT-MAD-LB.

3. On the other hand, Ld. A.R Shri A.Cletus made a number of submissions which can be summarized as under :

i) Even when appellant has opted for availing the exemption on the final products they are still very much an assessee. Hence when goods are removed as such, Rule 3 (5) of the Rules will necessarily have to be complied with. The provisions of Rule 11 of the Rules cannot override the provisions of Rule 3 (5) ibid.

ii) Ld. A.R drew our attention to the table in para 23.1 of the impugned order to point out that an amount of Rs.99,55,204/- became payable towards credit taken on the capital goods removed, upto 12.11.2007, namely, before introduction of Rule 11 (3) of the Rules. Hence harmonious reading of provisions of Rule 3 (5) and 4 (5) (a) of CCR 2004 will only bring forth that when cenvat availed capital goods are removed without use or removed, the manufacturer of the final product shall pay an amount equal to cenvat credit availed on such capital goods. Appellant's stand that they have gone out of the cenvat scheme and there is no need for them to pay amount under Rule 3 (5) of the CCR is not correct as they are required to comply with requirement of both the Rule 11 (3) and Rule 3 (5). Therefore amount equal to the credit originally availed is to be paid for removal of capital goods as such in the present case. The plea of limitation does not find merit since removal of capital goods which have taken place in June 2006 to December 2007 was not informed to the department only after audit investigation did the entire matter came to light.

4. Heard both sides and have gone through the facts of the case.

5.1 We find merit in the contention of the appellants that the matter present proceedings are hit by time bar. From the facts on record, what comes to the fore is that the appellants vide a letter dt. 07.05.2007 (received by the Department on 20.02.2008) had informed the jurisdictional Deputy Commissioner of Central Excise that they were going to shift all their machinery from their Singanallur unit to their Nilakottai unit. Certified copy of the Resolution passed by the Board of Directors of the appellants on 20.04.2007 had also been enclosed. A perusal of the said Resolution indicates one of the Resolutions was that “necessary applications be made with respective Departments of both State and Central so as to bring the smooth implementation of Unit II at the Nilakottai. It had also been resolved that “Sri T.K.Kannan, managing Director, Sri A. Mariappan, Director (Marketing & Finance) and Sri P.K. Venugopal, General Manager of the Company were authorized to make necessary applications with respective departments to obtain / transfer of licence and other statutory requirements. However, from the narration in para-10 of the SCN, it emerges that the said letter dt. 07.05.2007 was received by the Range Office only on 20.02.2008. In a statement dt. 11.08.2008, Shri A. Mariappan, Director (Marketing & Finance) of the appellant had explained that the letter was originally drafted for delivery in person, but they were told that the said letter was not required as they had already come out of the Central Excise control w.e.f. 1.8.2006. However later, they felt that intimation was necessary since they had not surrendered their Central Excise registration certificate and hence despatched the letter by post on 19.02.2008. Nonetheless, it is not clear from the narration or the statement as to on whose authority’s advice did the appellant hold back despatch of the letter dt. 07.05.2007. Even the said letter has been received only on 20.02.2008, it contained all the necessary factoids regarding proposed shifting of machinery etc. by appellant. Even after 20.02.2008, department could very well have taken immediate action and issued SCN with alacrity. However, department still took more than a year and half for the SCN to be issued only on 25.08.2009. In the circumstances, when the facts of the matter were known to the department by 20.2.2008, suppression of facts cannot be alleged and in consequence, the SCN issued belatedly will have to be considered as being hit by limitation. Interestingly, as per para-14 of the SCN amongst other documents relied upon for issuance of notice, is the letter dt. 07.05.2007 addressed to Deputy Commissioner of Central Excise.

5.2 We find that these aspects have been flagged by the appellant right from their reply to the SCN vide their letter dt. 18.09.2009. In that reply, it had been pointed out by appellants that they had come out of purview of cenvat scheme on 31.07.2006. The adjudicating authority in para 22 of the impugned order has also taken note of the appellant's claim that the demand is barred by limitation, however has not accepted their contentions.

5.3 From the facts on record and the findings supra, we are of the considered opinion that the present proceedings are surely hit by limitation. Having issued an earlier SCN on 19.02.2007 covering the period February 2006 to June 2006 the subsequent SCN should have been issued within the normal period and without invocation of extended period of demand and proposal for penalty under Section 11AC etc. of the Central Excise Act, 1944 as per the law laid down by the Hon'ble Apex court in judgment, for example, *Nizam Sugar Factory Vs CCE* - 2006 (197)

ELT 465 (SC), *ECE Industries Vs CCE*- 2004 (164) ELT 236 (SC) and *CCE VS Chemphar Drugs & Liniments – 1989 (40) ELT 276 (SC).*

6. Viewed in this light, the present SCN issued only on 25.08.2009 for the period June 2006 to December 2007 only is surely hit by limitation. The impugned order will get then vitiated on this aspect alone. This being so, without going into the merits of the matter, we set aside the impugned order and allow the appeal on the grounds of limitation.

(Order pronounced in court on 13.03.2019)

**(P. Dinesha)**
**Member (Judicial)**

**(Madhu Mohan Damodhar)**
**Member (Technical)**

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